80-1227

Supreme Court, U.S.
FILED
JAN 14 1981
MICHAEL RODAK, JR., CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1980

BOBBY F. TANNER, NED A. KNUTH, CAROL CAMPBELL, TOMMY CARLISLE, JOSEPH DAVENPORT, and FRANCIS UGOREK,

Petitioners,

vs.

MALCOLM McCALL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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BOBBY F. TANNER, NED A. KNUTH, CAROL CAMPBELL, TOMMY CARLISLE, JOSEPH DAVENPORT, and FRANCIS UGOREK,	:
Petitioners,	:
vs.	:
MALCOLM McCALL,	:
Respondent.	:

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The undersigned, on behalf of Bobby F. Tanner, Ned A. Knuth, Carol Campbell, Tommy Carlisle, Joseph Davenport, and Francis Ugorek, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on September 17, 1980.

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QUESTION PRESENTED

In a political patronage case, is the burden of proof of the Petitioners to demonstrate a prima facie case met by a showing that but for the electoral defeat of the individual who appointed them to their position of employment with a governmental entity, they would have continued in the employment of the governmental entity?

In the event this petition is granted, the Petitioners reserve the right to argue two further questions, i.e., whether the Petitioners should have been reinstated to their positions of employment with the governmental agency for whom they worked, and whether the Petitioners are entitled to back pay from the date of entry of the jury verdict against the Respondent Malcolm McCall.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Tanner v. McCall*, _____ F.2d _____ (5th Cir. 1980). The District Court issued an opinion denying a preliminary injunction, and granting the Respondent's motion for summary judgment on all but a political patronage claim, which is reported as *Tanner v. McCall*, 441 F. Supp. 503 (M.D. Fla. 1977). Thereafter, a jury trial was had on the political patronage claim. A verdict in favor of five of the six Petitioners was returned. No other opinion of the District Court is officially recorded. The opinions officially recorded are reprinted in the Appendix, commencing on pages A-1 and A-26, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered September 17, 1980. A timely petition for rehearing was filed. It was denied on October 16, 1980. The Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C., §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The principal constitutional provisions involved are under the First and Fourteenth Amendments to the United States Constitution, and involve the concept of political patronage as proscribed by this Court in the cases of *Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673, 49 L.Ed.2d 547 (1976), and *Branti v. Finkel*, _____ U.S. _____, 100 S. Ct. 1287, 63 L.Ed.2d 574 (1980).

STATEMENT OF THE CASE

The Petitioners were employees of the Lake County Sheriff's Department until January 4, 1977.

On January 4, 1977, the Respondent here, Malcolm Mc-

Call, a Democrat, assumed the office of Sheriff of Lake County as the result of his electoral victory in general elections held in November, 1976, over incumbent Guy Bliss, a Republican.

Upon assumption of the office of Sheriff of Lake County, the Respondent Malcolm McCall failed to reappoint between twenty percent (20%) and thirty percent (30%) of the employees who had worked for Sheriff Bliss, including the Petitioners here.

The Petitioners here filed an action under 42 U.S.C., §1983, in the United States District Court for the Middle District of Florida alleging that their dismissal was an unlawful patronage practice. Jurisdiction was premised on 28 U.S.C., §§1331 and 1343(3) and (4).

At trial, the predecessor to the Respondent, under whom all the Petitioners had been employed and had worked, stated that each of them had done a "fine job". At the time he left office, the predecessor to the Respondent here had no knowledge of any reason that would suggest termination of employment with the Lake County Sheriff's Department of any of the Petitioners. (Testimony of Guy C. Bliss, TR Vol. II, 152-188.)

During the course of the campaign for the office of Sheriff of Lake County, Florida, each of the Petitioners testified that they had actively supported the political campaign of Mr. Bliss against the Respondent here. (Ugorek, TR Vol. II, 201-202; Knuth, TR Vol. III, 315; Carlisle, TR Vol. III, 359; Tanner, TR Vol. III, 392; Davenport, TR Vol. IV, 445; and Campbell, TR Vol. IV, 479.) They further testified as to how the Respondent may have been aware of their support for Sheriff Bliss. The Respondent stipulated that he assumed all employees of the Lake County Sheriff's Department supported the candidacy of his general election opponent, Sheriff Bliss.

Each Petitioner testified as to what transpired between them and the Respondent here at the time of their termination. Each of the Petitioners requested to be continued in their employment with the Department.

Mr. Ugorek stated that the Respondent told him that he had performed satisfactorily with the former Sheriff, "but he had no place for [him] in his organization." (TR Vol. II, 204.)

Mr. Knuth was told that his services would not be needed with the Respondent's organization because "there would be a

personality conflict." (TR Vol. III, 316.)

Mr. Carlisle was told that "under the circumstances [the Respondent] couldn't use [him]." (TR Vol. III, 361-362.)

Petitioner Tanner indicated that in his conversation with the Respondent, the Respondent "indicated that it had been a long four years, and it sure felt good to be back home again."[1](TR Vol. IV, 405.) He told Petitioner Tanner that he, the Respondent, had his own people that he wanted to bring in. (TR Vol. IV, 406.)[2]

Petitioner Davenport was told by Respondent McCall, "that he didn't think that he and [Mr. Davenport] could work together." (TR Vol. IV, 444.)[3]

Petitioner Campbell said:

> I was told by Sheriff McCall that he did not—he was under the impression that I had done a good job with the Lake County Sheriff's Department, but he wanted to bring his own people in and that there was no place in the Department for my services.

Other non-Petitioners whose services had also been terminated, such as Randolph Ward, were told:

---

1 Respondent McCall had, prior to 1973 and the assumption that year of the office of Sheriff of Lake County by Guy Bliss, been employed by the Lake County Sheriff's Department. He had been so employed for twenty-two (22) years. Immediately prior to 1973, he was the Chief Deputy. During most of his employment, he served his father and then Sheriff, Willis McCall.

2 Many of those hired by the Respondent were former associates of Respondent McCall in the pre-1973 Sheriff's Department. Included were Don Scism, Robert Gnann, James A. Livingston, Douglas Yates, and Douglas Sewell. All were members of LEO, Lake Law Enforcement Organization, an organization founded and encouraged by the Respondent's father, Willis McCall. Sheriff Bliss discouraged membership in that organization and none of the Petitioners belonged. LEO supported the candidacy of Respondent McCall in the general election of November, 1976, for the office of Sheriff of Lake County.

3 Petitioner Davenport was replaced as Chief Correctional Officer. His replacement was Robert Gnann who had little experience in the area of Corrections. See, TR Vol. II, 88-89.

> He [the Respondent] said, "We never had any hard words or anything. We always got along fine," he said, "but I won't be able to use you in my administration." He said, "You have been a little too active."

(TR Vol. III, 259.) Mr. Ward was a registered Republican and supported Sheriff Bliss. (TR Vol. III, 260.)

Mr. Harold Underwood was a Civil Deputy under Sheriff Bliss. During the general elections campaign in 1976, he was also a candidate on the Republican party's slate for Tax Collector in Lake County. (TR Vol. III, 382.) He supported the Republican slate and Sheriff Bliss. (*Id.*) After the general election was completed, the Respondent interviewed Mr. Underwood and told him that "it looks like we were on opposite sides this time." (TR Vol. III, 385.) Mr. Underwood testified:

> And he [McCall] said that he was trying his best to get the best qualified deputies and all, and did I understand.
>
> And I said, "Yes." I said, "To the victor goes the spoils." And he said, "Yes." He said, "You know, I thought I was going to enjoy this very much." But he said, "some of the decisions I have to make are very hard decisions. And I have had to give a lot of thought to it."
>
> And I said, "Malcolm, you know whatever you do, you have to answer to the people for four years."
>
> And he said, "Yes."

(TR Vol. III, 385.)

After trial, a jury verdict in favor of the Petitioners Knuth, Campbell, Carlisle, Davenport, and Ugorek was entered against the Respondent McCall in a total amount of eighty-five thousand dollars ($85,000.00). A jury verdict in favor of the Respondent McCall, against Petitioner Tanner, who was the Chief Deputy of the Lake County Sheriff's Department under the

predecessor to Sheriff McCall, Guy Bliss, was also rendered.

The Respondent filed a motion for a new trial, and/or a directed verdict. The Petitioner Tanner also filed a motion for a new trial. The Petitioners Knuth, Campbell, Davenport, Carlisle, and Ugorek filed a motion for the entry of injunctive relief reinstating them to their positions of employment. By order rendered August 9, 1978, and an opinion of the same date, all motions were denied.

On September 9, 1978, an amended judgment in favor of Petitioners Knuth, Carlisle, Campbell, Davenport, and Ugorek was filed.

An appeal to the United States Circuit Court of Appeals for the Fifth Circuit was filed by the Respondent McCall. The Petitioner Bobby F. Tanner also filed his appeal, and cross-appeals were filed as to the denial of injunctive relief by Petitioners Knuth, Campbell, Carlisle, Davenport, and Ugorek.

On September 17, 1980, the United States Circuit Court of Appeals for the Fifth Circuit reversed the judgments for the Petitioners Campbell, Carlisle, Davenport, Knuth, and Ugorek. The denial of permanent injunctive relief was affirmed, as was the judgment against Petitioner Tanner. In taking the action that it did, the Court of Appeals concluded that the Petitioners did not meet their burden of proving that political patronage was a substantial or motivating factor in the Respondent's employment decisions.

REASONS FOR GRANTING THE WRIT

In *Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673, 49 L.Ed.2d 547 (1976), this Court held that patronage dismissals severely restrict political belief and association. Therefore, it held that the practice of patronage dismissals is unconstitutional under the First and Fourteenth Amendments to the Constitution of the United States of America. In *Branti v. Finkel*, _____ U.S. _____, 100 S. Ct. 1287, 63 L.Ed.2d 574 (1980), this Court reaffirmed the *Elrod* holding, and extended it to cover policy-making or confidential positions where the hiring authority cannot demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.

In holding that patronage dismissals constitute an unconstitutional impingement on First and Fourteenth Amendment rights of governmental employees, the Court dealt in *Elrod* with a blatant case where the employer required the employees openly to change their party preference if they were to continue their employment. In *Branti*, the hiring authority attempted, belatedly, to justify the dismissals on non-political grounds. But, in *Branti*, the District Court found that the Assistant Public Defenders involved there had been satisfactorily performing their jobs as Assistant Public Defenders. In the instant case, the Petitioners had been performing their jobs in a satisfactory manner, and but for the results of November, 1976, general election for the office of Sheriff of Lake County, they would have continued their employment with the Lake County Sheriff's Department.

Nonetheless, the Court of Appeals reversed the jury verdict, contending that Petitioners did not meet their burden of proving that political discrimination was a substantial or motivating factor in the Respondent's employment decisions. The reversal was made even though Senior United States District Judge, Charles R. Scott, denied a motion for a directed verdict in favor of the Respondent.

A review of the opinion issued by the Circuit Court of Appeals would reveal a rejection of the circumstantial evidence presented by the Petitioners as to their patronage claim. Included in that evidence is testimony by the predecessor to the Respondent, Guy Bliss, that the Petitioners were doing a "fine job", and that he knew of no reason for their non-continuation in their positions of employment. The Petitioners contend that a prima facie case of patronage is demonstrated by such a showing. The jury verdict entered on the prima facie case should not have been reversed.

At least one other Circuit would seemingly concur.

In *Gabriel v. Benitez*, 390 F. Supp. 988 (D. Puerto Rico 1975), *aff'd sub nom*, *Riviera Morales de Benitez de Rexach*, 544 F.2d 882 (1st Cir. 1976), an employee who served as a Field Coordinator for Puerto Rico of a Staff Development Project, United States Department of Health, Education, and Welfare, which was funded for the training of adult educators, and who had initially been appointed for a one-year period which ended June 30, 1973, was given notice that her appointment would not

be renewed some five months after the defendant in that case assumed office as Secretary of Education. No reasons were given for the decision.

The evidence was that Gabriel had never received any notice or complaint from the Project Director or her supervisors regarding her performance. There was in the instant case no notice of any complaint evidenced of the performance of any of the Petitioners. In the case of *Gabriel*, her former supervisor stated that her work was " 'excellent' ". Here, former Sheriff Guy C. Bliss testified that the Petitioners performed in a very good fashion, or did a "fine job".

Gabriel's replacement was a member of the popular Democratic party, where she was a member of the New Progressive party. Here, the Petitioners were supporters of Guy C. Bliss, and, with the exception of Mr. Carlisle, were all Republicans. By way of contrast, the replacements for the Petitioners here were all supporters of Malcolm McCall, and all former associates of his prior to December 15, 1972. By way of contrast, they were Democrats, with the exception of one who was a Republican.

No evidence was adduced that Benitez knew Gabriel's political affiliation, although her affiliation was known by some persons at the Central Office of the Department of Education where she worked. Here, the Respondent Sheriff stated that all former employees of Sheriff Guy C. Bliss supported Mr. Bliss' election campaign for Sheriff. The Petitioners described the public way in which their affiliation with Mr. Bliss was demonstrated. Further, within the personnel files of each officer was an application form that clearly listed the political party with which they were affiliated. (TR Vol. III, 395.)

The court in *Gabriel*, *supra*, said of the evidence:

> We must carefully consider, however, the effect, if any, of the Plaintiff's failure to bring direct proof of Defendant's knowledge of Plaintiff's political affiliation. A related problem is that there is also no direct proof that Defendant acted from political motivation. If direct proof of such matters were an essential element of discrimination cases, there would be few, if any, successful civil rights cases in the books. We

believe, however, that such is not the law (citations omitted); and that circumstantial evidence is as valid in civil rights cases as in any other case before the law. By circumstantial evidence, we mean, of course, proof of the chain of circumstances pointing to the existence or non-existence of certain facts. *Wilkins v. Hogan*, 425 F.2d 1022 (C.A. 10 1970); *Ezzard v. U.S.*, 7 F.2d 808, 810 (C.A. 8 1925); *The Robert Edwards*, 19 U.S. (6 Wheat.) 187, 198, 5 L.Ed.2d 238 (1821).

The chain of circumstances herein clearly points to the missing link, which is Defendant's political motivation in her non-renewal of Plaintiff's contract. Plaintiff was hired for a three-year program; she performs her work without complaint from her supervisors; Defendant, a prominent member of the popular Democratic party, becomes Secretary of Education; thereafter, Plaintiff, a member of the New Progressive party, is eliminated from attendance at staff conferences, and is not allowed to communicate with her program directors in the mainland; Defendant "terminates" Plaintiff's employment as of June 30, 1973, and the day after, hires a member of her own party to replace Plaintiff; no reasons are given to Plaintiff for her "termination;" the three-year program continues in full force and effect after Plaintiff's departure.

It would require a stretching of credulance to the breaking point to ascribe this sequence of events to mere coincidence.

In the context of patronage dismissals, the Petitioners believe that an employee has laid a prima facie case when he has shown that, but for the election of a new hiring authority, they would have continued in their employment. Accordingly, unless the Respondent rebuts the prima facie case with substantial evidence of constitutionally permissible reasons for the non-continuation of the Petitioners in their positions of employment, the Petitioners should be reinstated to those positions,

and the jury verdict in their favor should be granted.

Unless review by this Court is had, employers will continue to discharge employees for patronage reasons, and hide behind sphinx-like silence. The shield of silence will protect the hiring authorities from liability. The practice of patronage, despite *Elrod's* holding, will be perpetuated. This Court should establish a burden of proof in patronage cases which will require of plaintiffs in such actions to show that they were employed by an office holder who was defeated in an election. Subsequent to the election their employment was terminated. Had the office holder under whom they worked not been defeated in an election, the Petitioners would have continued in their employment. The burden would then shift to the Defendant office holder, victorious candidate, to demonstrate and disclose some constitutionally permissible reason to justify the discharge. Had the Fifth Circuit Court of Appeals applied this test, it would have upheld the jury verdict won by Petitioners Ugorek, Knuth, Davenport, Carlisle, and Campbell. It would have ordered a new trial for Petitioner Tanner.

In a democratic government, and in a democratic society, secrecy is anathema. Disclosure is the by-word. The Freedom of Information Act, and the various public records acts of the states, encourage disclosure. Governments are encouraged to operate in the sunshine. But, if in patronage cases, the plaintiffs must demonstrate more than that they would have continued in their positions of employment but for a political change, before the Defendant governmental official must come forth with substantial reasons of his motivation to discontinue their services, Machiavellian deviousness will be encouraged to avoid the holding of this Court that dismissals for patronage reasons are unconstitutional under the First and Fourteenth Amendments to the Constitution of the United States of America.

Clearly, it should be the government's burden to demonstrate an overriding interest in order to validate an encroachment on protected interests. As this Court noted in *Elrod*,

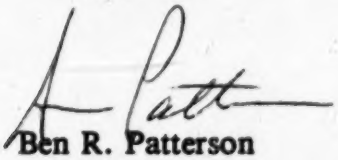
> Specifically, employees may always be discharged for good cause, such as insubordination or poor job performance when those bases, in fact, exist.

Any more rigorous burden of proof than that suggested here to be imposed on discharged employees/plaintiffs in a patronage case would implicitly condition retention of public employment on the employee's support of the "in" party, the holding of *Elrod* be damned.

CONCLUSION

This Court should review this case because the issue of patronage dismissals, and the burden of proof in such cases, is a matter of substantial public importance and concern, particularly in the aftermath of the 1980 elections. For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished, by pre-paid United States Mail, to J. Fred Parker, Jr., Esq., 318 North Monroe, P.O. Box 669, Tallahassee, Florida 32302, this 14th day of January, 1981.

Ben R. Patterson

Office-Supreme Court, U.S.
FILED
MAR 6 1981
ALEXANDER L. STEVAS,
CLERK

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No.

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1980

BOBBY F. TANNER, NED A. KNUTH, CAROL CAMPBELL, TOMMY CARLISLE, JOSEPH DAVENPORT, and FRANCIS UGOREK,

Petitioners,

vs.

MALCOLM McCALL,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TANNER v. McCALL

Bobby F. TANNER, Plaintiff-Appellee, Appellant,

Ned A. Knuth et al., Plaintiffs-Appellees, Cross-Appellants,

v.

Malcolm McCall, individually and in his official capacity as Sheriff of Lake County, Florida, Defendant-Appellant, Cross-Appellee.

No. 78-3211.

United States Court of Appeals,
Fifth Circuit.

Sept. 17, 1980.

A civil rights suit was brought against sheriff by five former deputies and a former secretary who alleged that patronage considerations unlawfully motivated defendant's decision not to reappoint them. The United States District Court for the Middle District of Florida, at Ocala, Charles R. Scott, J., entered a judgment from which appeals and a cross appeal were taken. The Court of Appeals, Fay, Circuit Judge, held that plaintiffs did not meet their burden of proving that political discrimination was a substantial or motivating factor in defendant's employment decision; the objective manifestations did not supply inferences rising to the level of proof of a subjective intent of political animus.

Affirmed in part and reversed in part.

October 16, 1980

TO ALL PARTIES LISTED BELOW:

NO. 78-3211 - BOBBY F. TANNER; NED A. KNUTH, ET AL. -vs- MALCOLM McCALL, Etc.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

AMENDED
JUDGMENT

O.R. Book **666** page **1224**

This action came on for trial before the Court and a jury, Honorable CHARLES R. SCOTT Senior, United States District Judge, presiding, and the issues have been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged

That the Plaintiff Bobby F. Tanner take nothing, That the action be dismissed on the merits and that the Defendant Malcolm McCall in his capacity as Sheriff of Lake County, Florida recover of Plaintiff Bobby F. Tanner his costs of action;

It is further ordered and adjudged that the Pltf. Ned A. Knuth recover of the Defendant Malcolm McCall in his capacity as Sheriff of Lake County, Florida, the sum of TWENTY THOUSAND and no/100 DOLLARS ($20,000.00) with interest thereon at the legal rate as provided by law and costs of action...

It is further ordered that the Pltf. Carol A. Campbell recover of the Deft. Malcolm McCall in his capacity as Sheriff of Lake County, Florida the Sum of TEN THOUSAND and no/100 DOLLARS ($10,000.00) with interest thereon at the legal rate as provided by law and his costs of action.....

It is further ordered that the Pltf. Tommy Carisle recover of the Deft. Malcolm McCall in his capacity as Sheriff of Lake County, Florida, the sum of SEVENTEEN THOUSAND FIVE HUNDRED and no/100 DOLLARS ($17,500.00) with interest thereon at the legal rate as provided by law and his costs of action.....

It is further ordered that the Pltf. Joseph E. Davenport recover of the Deft. Malcolm McCall, in capacity as Sheriff of Lake County, Florida the sum of TWENTY THOUSAND AND no/100 DOLLARS ($20,000.00) with interest thereon at the legal rate as provided by law and his costs of action.....

It is further ordered that the Plaintiff FRANCIS J. URGOREK recover of the Deft. Malcolm McCall in his capacity as Sheriff of Lake County, Florida the sum of SEVENTEEN THOUSAND FIVE HUNDRED AND no/100 DOLLARS ($17,500.00) with interest thereon at the legal rate as provided by law and his costs of action.....

Dated September 9, 1978

TANNER v. McCALL

Appeals from the United States District Court for the Middle District of Florida.

Before FAY, KRAVITCH and RANDALL, Circuit Judges.

FAY, Circuit Judge:

Five former deputies and a former secretary of the Lake County Sheriff's Department sued Sheriff Malcolm McCall for violating their rights under the first and fourteenth amendments and 42 U.S.C. § 1983 (1976). Plaintiffs alleged that patronage considerations unlawfully motivated McCall's decision not to reappoint them. A jury returned a verdict against plaintiff Bobby F. Tanner, former chief deputy, and in favor of the other plaintiffs. The trial court amended the judgment on the verdict, restricting its reach to McCall in his official capacity only. The court also awarded attorneys' fees under 42 U.S.C. § 1988 (1976), denied the victorious plaintiffs' motion for reinstatement with back and front pay, and partially granted plaintiffs' requests for costs. Sheriff McCall appeals from the trial court's refusal to grant a directed verdict against all plaintiffs, from its damage award against a public entity, and from the fee award. Plaintiff Tanner appeals the trial court's denial of his motion for new trial, which alleged improper evidentiary admissions. The other plaintiffs cross-appeal the denial of reinstatement, back and front pay, and certain costs. They also contend that the court improperly amended the judgment to exclude McCall's individual liability. We reverse the judgments against McCall.[1]

I. FACTS

Willis McCall, the defendant's father, was sheriff of Lake County, Florida from 1945 to 1972. Malcolm McCall worked in the department for much of that time and was his father's chief deputy from 1966 to 1972. In 1972, Guy Bliss, a Republican, defeated Willis McCall, a Democrat, in the election for sheriff.

1. Our reversal of the judgments against McCall renders unnecessary the resolution of the other issues.

[1-3] When Sheriff Bliss was elected, he did not reappoint ten of the fifteen deputies, including Malcolm McCall. Under Florida law, a sheriff does not "employ" deputies, but "appoints" them. *Murphy v. Mack*, 358 So.2d 822, 823-24 (Fla. 1978). The appointment ends when the sheriff's power ends. By statute,

> [s]heriffs may appoint deputies to act under them who shall have the same power as the sheriff appointing them, and for the neglect and default of whom in the execution of their office the sheriff shall be responsible.

Fla.Stat.Ann. § 30.07 (West 1974). A deputy is the sheriff's alter ego and has all the sheriff's sovereign powers, except the power to appoint other deputies. A deputy's actions are those of the sheriff and the sheriff is civilly liable for those actions:

> It is essential to law enforcement in the various counties of the State that the people shall be able to place responsibility upon a particular individual, the sheriff. He and he alone appoints his deputies and is responsible for them. It was never contemplated that the sheriffs of the state must perform the powers and duties vested in them through deputies or assistants selected by someone else.

Blackburn v. Brorein, 70 So.2d 293, 298 (Fla. 1954). Because of this responsibility, Florida law has reserved to the sheriff absolute control over selection and retention of deputies. *Murphy v. Mack*, 358 So.2d at 825; *Blackburn v. Brorein*, 70 So.2d at 298.

In 1976, Malcolm McCall, running as a Democrat, defeated Bliss's bid for reelection. By this time the department's staff had grown to almost eighty, including between thirty and thirty-five deputies. McCall received approximately three hundred applications for these positions. Before he took office, McCall interviewed almost all the Bliss employees as applicants for employment. Generally, the interviews were to acquaint McCall with the employees, their jobs, their attitudes about their jobs, and their feelings about working for McCall. McCall assumed that

all employees had supported Sheriff Bliss during his bid for reelection; McCall claims he would have thought less of them if they had not. McCall did not ask interviewees which candidate they had supported or their political party affiliation; he actually discouraged employees from volunteering that information. McCall did not tell any of the plaintiffs that he was not reappointing them for patronage reasons.

McCall decided to reappoint all but nineteen or twenty of the Bliss employees. Three other Bliss employees resigned.[2] Fifty-five of the Bliss employees whom McCall reappointed were still employed in the department when the case was tried.

Plaintiff Carol Campbell was the only office worker McCall did not reappoint. McCall eliminated her position, secretary to the chief deputy. The chief deputy's work is now handled by the sheriff's secretary. Plaintiff Ugorek's position of senior sergeant supervisor also was eliminated. Plaintiff Davenport, the jailer, was replaced by Robert Gnann, who had worked in the pre-1972 department. Plaintiff Tanner, the chief deputy, was replaced by Donald Scism, a Republican who had worked for Lake County from 1962-1972 and for other police and sheriff's departments before returning to Lake County in February of 1977. Plaintiff Carlisle was a deputy working as a plainclothes vice investigator. McCall now has six investigators whose scope of duties is not as departmentalized as it was under Bliss. At least three newly appointed deputies work as in-

2. The job titles used by Bliss and McCall are not the same. The employees not remaining with McCall included the chief deputy, the detention supervisor, the matron, a radio operator, a process server, a secretary, civil deputies, deputies, investigators, senior sergeant supervisor, and sergeants. Record at 124. The record does not reflect how many of these people held arrest powers. Deputy Oliver and Sergeant Gooden resigned. Civil Deputy Underwood told McCall during his interview that if McCall was starting a juvenile division he would like to stay, but that otherwise he would resign. Transcript at 384-85.

vestigators; they all had worked for Lake County under McCall's father.[3] One of them, who had worked with Willis McCall from 1950 to 1972, contributed $25.00 to Malcolm McCall's campaign. Plaintiff Knuth was a patrol or road deputy. Eight new road deputies were hired,[4] none of whom worked for the department before 1972 or contributed to McCall's campaign.

Because the department's size fluctuated, pinpointing the number of new appointees at any given time is difficult. The department had less than eighty positions in January of 1977. It had about eight-five when this case was tried. McCall now has forty officers with arrest powers. He began with between thirty and thirty-five. Since his election, McCall has appointed approximately twenty new officers with arrest powers. McCall did not appoint all of them immediately upon his assumption of office in January, and the record does not reflect which of them filled the five to ten newly created slots. Six of these twenty newly appointed officers had worked with McCall before 1972.[5] Four other people were appointed who had worked for the department in various capacities before 1972. Of those ten, four, including one part-time employee, contributed a total of $135.00 to McCall's $18,000 campaign. Another newly appointed deputy, who had not previously been with the department, contributed $2.50.

3. Two of these investigators, Deputy Flavell and Deputy Secrease, were first hired by Willis McCall but had been retained by Sheriff Bliss until 1973. *See also* note 19 *infra*.

4. According to testimony in one of the plaintiffs' proffers, some of the road deputies were hired well after McCall's oath of office on January 3, 1977. One was hired in March, one in April, two in July, and one in December of 1977.

During his testimony, McCall listed eight new road deputies. Trainscript at 117. During the proffer, other employees were mentioned, but it is not clear whether they also were road deputies. This proffered testimony did not go to the jury.

5. This figure includes Flavell and Secrease. *See* note 3 *supra*.

II. PRETRIAL PROCEEDINGS

Seven days after McCall took office, plaintiffs filed a complaint alleging that McCall wrongfully terminated their employment, that he deprived them of a property interest in their jobs, that he had stigmatized them, damaging their good names and reputations, and that he infringed their first amendment rights to support Sheriff Bliss by terminating or failing to reappoint them because of that support. Plaintiffs moved for a preliminary injunction ordering reinstatement. The court issued a combined order denying the injunction and granting McCall's motion for summary judgment on all but the political patronage claim.[6] *Tanner v. McCall*, 441 F.Supp. 503 (M.D.Fla.1977). As to the patronage claim, the court stated that the plaintiffs had neither presented a prima facie case of politically discriminatory animus nor shown that infringement of protected freedoms was "the primary and dominant cause" of their failure to be reappointed. *Id.* at 513, 514.[7] Nevertheless, the court held that a genuine issue of material fact existed on whether plaintiffs were not reappointed because of their political views. *Id.* at 514-15. Summary judgment was therefore denied and the case went to trial on the political discrimination—patronage claim.

6. Plaintiffs do not appeal the district court's finding that the plaintiffs had no property interest in their jobs, that they had not been stigmatized, that they had not been denied due process, and that they were not entitled to a preliminary injunctiond.

7. The district court stated:

> In the present case, plaintiffs have the burden to show, both ultimately on the merits, and prima facie on their preliminary injunction motion, that they were not continued in their jobs because of political discrimination. . . . However, plaintiffs have not met their burden. Defendant has indicated that he did not know or consider the political allegiances of plaintiffs or any other employees of the sheriff's department when he decided to retain some and replace others. Deposition at 41, 55, 63. Although plaintiffs supported the candidacy of the incumbent sheriff, so did many other employees, who were retained by defendant. Hence, the fact of plaintiffs' uniform political support alone cannot show any infringement of their First Amendment freedoms by defendant. Far from showing anything additional, plaintiffs have indicated that defendant did not inquire, and discouraged voluntary statements, about their political stances in the preceding election. The

III. PARTIES' POSITIONS

Plaintiffs claim they were not reappointed either because of their political support for Sheriff Bliss or because McCall wanted room for appointment of his political supporters. McCall replies that he merely used his best judgment to select from the three hundred applicants those with whom he felt he could work, and those who he felt could do the best job for Lake County.

On appeal, McCall argues that in this situation even a politically motivated decision would not amount to an impermissible abridgement of plaintiffs' first amendment freedoms. He also asserts that plaintiffs failed to make a prima facie showing that his failure to reappoint them was solely because of their exercise of first amendment freedoms. As to some of the plaintiffs, McCall also argues that he proved independent reasons for his decision not to reappoint them. McCall therefore claims that the court should have granted his motion for directed verdict.

> Court concludes that plaintiffs have not met their burden to show a prima facie case of politically discriminatory animus by defendant.
>
> Furthermore, even if plaintiffs had demonstrated a prima facie case of polictical discrimination in defendant's decision not to continue their employment, they would need to show more in order to prevail. Plaintiffs must show that any impermissible infringement of protected First Amendment freedoms (such as political beliefs, expression, and association) was the primary and dominant cause of their terminations. In short, plaintiffs must show that, even if defendant wished to curtail their protected First Amendment freedoms, apart from that wrongful reason, there were no other good reasons that independently justified their discharges.
>
> Plaintiffs in the present case have not demonstrated anything near a likelihood (1) that they were replaced for politically discriminatory reasons, or (2) that if they had been, there were no other, independent and legitimate reasons to justify replacing them. Defendant, meanwhile, maintains that his decision to replace plaintiffs was based on reasons that, consistent with his campaign promise, would achieve a better operating sheriff's department. Whether those reasons are sound is not within the province of this Court to determine, so long as they are arguably legitimate and not a mere pretext for violating basic constitutional freedoms. Plaintiffs have not established a prima facie case of such pretense that would entitle them to a preliminary injunction.

441 F. Supp. at 513-14 (citations omitted).

IV. POLITICAL PATRONAGE

A. Constitutional Guidelines

[4.5] A discussion of the applicable precedent is necessary to set in the proper context a review of this case. Government employers can neither coerce employees to compromise their beliefs nor place unconstitutional conditions upon public employment. *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S. Ct. 2694, 2697, 33 L.Ed.2d 570 (1972); *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968); *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06, 87 S.Ct. 675, 684-685, 17 L.Ed.2d 629 (1967). The employee does not, however, receive blanket first amendment protection regardless of the governmental interest. A balance is struck between the employee's first amendment interest and the government's interest "in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Education*, 391 U.S. at 568, 88 S.Ct. at 1735. Not only must the means chosen be rationally related to furthering a paramount or vital governmental interest, but the means must also be closely drawn to avoid unnecessary abridgement of first amendment freedoms. *Buckley v. Valeo*, 424 U.S. 1, 64-65, 96 S.Ct. 612, 656, 46 L.Ed.2d 659 (1976); *Pickering v. Board of Education*, 391 U.S. at 568, 88 S.Ct. at 1734.

In *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), the Supreme Court applied this first amendment framework to partisan dismissals of county employees. The sheriff in *Elrod* had discharged or threatened discharge of the Process Division's chief deputy, an office employee, a process server, and a bailiff-security guard. *Id.* at 351, 96 S.Ct. at 2678. The Court held that the Constitution proscribes discharge of noncivil service employees solely because they did not support and were not members of the political party of the newly-elected sheriff, or solely because they had failed to obtain the sponsorship of the leaders of that party. In his plurality opinion, Justice Brennan noted that patronage dismissals are but one form of patronage practice. "The practice also includes placing loyal supporters in government jobs that may or may not have been

made available by political discharges." *Id.* at 353, 96 S.Ct. at 2679.[8] Justice Brennan stated the test for balancing private and governmental interests:

> [I]f conditioning the retention of public employment on the employee's support of the in-party is to survive constitutional challenge, it must further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights.

Id. at 363, 96 S.Ct. at 2685 (footnote omitted). The plurality rejected the position that interests in efficiency and effectiveness were furthered by wholesale replacement of employees whenever a new political party rises to power. *Id.* at 364-67, 96 S.Ct. at 2685-2686. Found to be of greater weight were the employer's interests in political loyalty. The plurality decided, however, that loyalty too was inadequate to justify wholesale patronage dismissals. "Limiting patronage dismissals to policymaking positions is sufficient to achieve this governmental end." *Id.* at 367-68, 372-73, 96 S.Ct. at 2687. Justices Stewart and Blackmun concurred, stating that a "nonpolicymaking, nonconfidential government employee" cannot be discharged solely because of political beliefs.

[6] Recently in *Branti v. Finkel*, _____ U.S. _____, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980), the Supreme Court reaffirmed *Elrod's* principle but modified its exception for policymaking employees. In *Branti*, the Court found constitutional deficiencies in the planned termination of Assistant

8. We note that while the Court included the placing of loyal supporters in its definition of patronage practice, it has not been confronted with a situation in which loyal supporters of the elected candidate were preferred over less loyal supporters, neutral applicants, or the supporters of the opposition. The Supreme Court's patronage cases to date have concerned employment decisions based on allegiance to a political party, not to a political candidate. Those cases involved situations in which employment decisions were in effect made by a political caucus, not the elected candidate.

County Public Defenders solely because they had not been recommended or sponsored by the in-party caucus.[9] In rejecting the argument that assistants are policymaking and confidential employees, the court recast the exception for when an employer could justifiably dismiss employees despite their exercise of their first amendment freedom to choose their political beliefs:

> [I]f an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency.
>
> * * * * * *
>
> In sum, the ultimate inquiry is not whether the label "policy maker" or "confidential" fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.

_____U.S. at _____, 100 S.Ct. at 1294. The Court rejected a blanket exception for policymaking employees. The employer must show that the required political support or affiliation is relevant or essential to the job. *Id.*

B. Order of Review

Review of this patronage case can be divided into three steps. The logical first step would be to determine, assuming that

9. Six of nine assistants were scheduled for termination. "With one possible exception, the nine who were to be appointed or retained were all Democrats and were all selected by Democratic legislators or Democratic town chairmen on a basis that had been determined by the Democratic caucus." _____ U.S. at _____, 100 S.Ct. at 1290. The exception was Manuel Sanchez, who was retained because he speaks Spanish, *Finkel v. Branti*, 457 F.Supp. 1284, 1287 n.8 (S.D.N.Y.1978). The plaintiffs were Republicans although one had changed his party registration to Democrat in 1977 to further his chances of being reappointed. _____ U.S. at _____ & n.4, 100 S.Ct. at 1290.

plaintiffs' allegations are true, whether the defendant's conduct was an impermissible infringement of first amendment freedoms. Precepts of judicial decision making, however, require consideration first of the nonconstitutional grounds raised by appellant. *See New York Transit Authority v. Beazer*, 440 U.S. 568, 582-83 n.22, 99 S.Ct. 1355, 1363-1364, 59 L.Ed.2d 587 (1979); *Rescue Army v. Municipal Court*, 331 U.S. 549, 568-69, 67 S.Ct. 1409, 1419, 91 L.Ed. 1666 (1947) *quoting Ashwander v. TVA*, 297 U.S. 288, 346-348, 56 S.Ct. 466, 482-483, 80 L.Ed. 688 (1936) (Brandeis, J., concurring). We will therefore begin by assuming that plaintiffs' allegations would support a finding of a first amendment violation, and turn to the second question: whether the plaintiffs have met their burden of showing a constitutional deprivation. The final inquiry is whether defendant rebutted this showing with sufficient evidence that the same employment decision would have been reached regardless of the constitutionally protected conduct.

C. Sufficiency of the Evidence

Side-stepping the balancing of plaintiffs' first amendment interests against McCall's interests in the efficiency and loyalty of his deputies and employees, we review the plaintiffs' proof of political patronage.

Unlike *Elrod* and *Branti*, this case involves neither the wholesale discharge of out-party employees nor the dismissal of those not sponsored by an in-party caucus. Political party affiliation has only tangential revelance.[10] McCall is a Democrat. Bliss is a Republican. Nevertheless, McCall did not know or ask the applicants' party affiliation. One plaintiff is a registered Democrat. Transcript at 379. Another is now a Republican, but

10. Even if party affiliation were more relevant, plaintiffs would not automatically succeed with their claims. The Supreme Court has expressly reserved judgment on whether an employee with broad public responsibilities can be discharged because of party affiliation or loyalty. *Branti v. Finkel*, _____ U.S. at _____ n.13, 100 S.Ct. at 1294. McCall has continuously argued that Florida deputies are policymaking employees with broad responsibilities. The sheriff's utmost confidence in the loyalty and efficiency of the deputies is essential and relevant under the Florida scheme. McCall therefore argues that his conduct was not constitutionally prohibited.

is listed as a Democrat in his employment file. *Id.* at 319. The other plaintiffs are Republicans. *Id.* at 392, 445, 479. Scism, however, McCall's newly appointed chief deputy, is also a Republican. *Id.* at 267. Little or no other evidence was supplied on the party affiliation of the other retained, newly appointed, and not reappointed employees.[11] Party affiliation does not differentiate the plaintiffs from the new appointees, and plaintiffs do not argue that they were not reappointed because of their affiliation. Their position is that they were not appointed because of their support for Bliss or because McCall wanted to hire his political supporters. Political party affiliation is used only as an inaccurate litmus for whether an employee might be a Bliss or McCall supporter. Plaintiffs' contention can only be that retention or appointment coincided with support and loyalty for a man, not for a political party.

Even in this regard, the facts do not support plaintiffs' position. Unlike the employers in *Elrod* and *Branti*, McCall did not effect a wholesale replacement of employees. He failed to reappoint only between twenty and thirty percent of the employees appointed by Bliss or about twenty of the eighty employees. He did not fire all Bliss supporters. He did not appoint only ardent McCall supporters. He did not appoint only Democrats.[12] Although all the plaintiffs were Bliss supporters, McCall assumed all employees had supported Bliss. McCall actually knew that some of the employees he was reappointing had actively supported Bliss. No evidence was admitted to show that the plaintiffs were more active than most Bliss supporters, or to show that the replacement appointees were more active than most McCall supporters.[13] Only one of the appointees who

11. The five retained employees who testified, Bradley, Swingle, Fogle, Johnson and Lutrell, were not asked their party affiliation. Of the four newly appointed deputies who testified, Gnann, Livingston, and Sewell are Democrats and Scism is Republican. No evidence was offered on the party affiliation of the other appointees. Except for that on plaintiffs, no evidence was offered on the affiliation of the people who were not reappointed. Party affiliation is a matter of public record in Florida.

12. *See* note 16 *supra* on the use and weight of statistics in this case.

13. Donald Scism, the new chief deputy, was in Seminole County and did not campaign at all for McCall.

might have been a replacement for a plaintiff contributed money to McCall's campaign.

Plaintiffs supplied no direct statements by McCall that political patronage motivated his appointments. Statements which might be considered most suggestive of such a motive were not directed to plaintiffs, and do not support an inference of an overall pattern of patronage motive.[14]

Plaintiffs argue that McCall's statement to Tanner that he would interview all the employees and that "he had his own people he wanted to bring in" supports their claim that McCall was appointing his political supporters.[15] McCall stated at the

14. Deputy Underwood had been the Republican candidate for tax collector in the 1976 election. After Underwood congratulated McCall, McCall said it looked like they were "on the opposite sides this time." Transcript at 385. As they went over Underwood's file, Underwood stated he would not be interested in staying with the department unless McCall had plans for a juvenile division. According to Underwood, the conversation continued as follows:

> And he [McCall] said that he was trying his best to get the best qualified deputies and all, and did I understand.
>
> And I said, "Yes." I said, "To the victor goes the spoils."
>
> And he said, "Yes." He said, you know, "I thought I was going to enjoy this very much." But he said, "Some of the decisions I have to make are very hard decisions. And I have had to give a lot of thought to it."
>
> And I said, "Malcolm, you know whatever you do, you have to answer to the people for four years."
>
> And he said, "Yes."

Id.

Witness Randolph Ward was a Bliss employee who had worked with McCall under the interim Sheriff in 1972. The following is Ward's testimony on McCall's statements to him:

> And he [McCall] said, "Randolph, I have been knowing you a long time." . . . He said, "We never had any hard words or anything. We always got along fine." He said, "But I won't be able to use you in my administration." He said, "You have been a little too active."

Id. at 259. Ward testified that he could not say what McCall meant by "too active." *Id.* at 260. No testimony was admitted on Ward's political activities during the 1976 campaign.

15. Campbell may have heard McCall make a similar statement, although after confrontation with her deposition, she said she was not sure whether he said he wanted his own "secretary" or his own "people." Transcript at 479, 487. In his deposition, McCall said he had people he wanted to place in a number of positions. *Id.* at 80-81.

same time, however, that he did not know who or how many new people he would appoint, although it could be as many as ten or fifteen. Transcript at 406. In context, the statement does not support plaintiffs' position, especially since one would expect McCall to know who it was he planned to appoint if political patronage were a factor. The statement is merely a variation of McCall's continued assertion that he was selecting from the three hundred applicants those who could work best with him to do the best job for Lake County. Obviously all the applicants could not be appointed since less than eighty positions were available.

The other circumstantial proof urged by plaintiffs does not support an inference of patronage. McCall made the appointments after the election, but under Florida law all prior appointments had ended when Bliss left office. Five people who might have been replacements for three plaintiffs had worked with McCall before, but familiarity with an applicant's abilities is not logically equivalent to political patronage.

[7-11] The evidence is insufficient to support an inference that McCall was motivated by an intent to discriminate against plaintiffs because of their support for Bliss or by a desire to make room for McCall's own political supporters. Part of the plaintiffs' burden is proving that the defendant's intent to discriminate or violate the plaintiffs' constitutional rights was a substantial motivating factor in the employment decision. *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977); *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). When neutral decisional criteria are utilized by an employer, a plaintiff's case is more difficult to prove. Circumstantial evidence can be used to supply inferences of an intent to infringe constitutional rights. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-68, 97 S.Ct. 555, 562-565, 50 L.Ed.2d 450 (1977). The strength of the inference, however, depends upon the strength of the circumstances. *Wilson v. Thompson*, 593 F.2d 1375, 1387 (5th Cir. 1979). In some cases, the inferences fail to ripen into proof. *See Personnel Administrators' of Massachusetts v. Feeney*, 442

U.S. 256, 279 n.25, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979). In this case no clear statistical pattern of discrimination exists.[16] The sequence of events, McCall's appointment of employees after an election, was necessitated by the Florida statutory scheme. No procedural or substantive departures were shown. Contemporaneous statements by McCall do not support an inference of political animus. *See Village of Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. at 264-68, 97 S.Ct. at 562-565.[17] The aim in any section 1983 case grounded on a constitutional violation is to ascertain the defendant's motive, even when objective manifestations of intent are all that

16. Whether use of statistical evidence is appropriate in establishing a prima facie case of disparate treatment under Title VII is not altogether clear. *Compare Kinsey v. First Regional Securities, Inc.*, 557 F.2d 830 (D.C.Cir. 1977) *with Harper v. Trans World Airlines, Inc.*, 525 F.2d 409 (8th cir. 1975). *See generally* Comment, *The Role of Statistical Evidence in Establishing a Prima Facie Case of Employment Discrimination: Davis v. Califano*, 14 Ga.L.Rev. 615 (1980). Nevertheless, employers are allowed to introduce statistics as some proof of lack of discriminatory motive in Title VII disparate treatment cases even though such proof is insufficient to demonstrate conclusively that the actions were not discriminatorily motivated. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 579-80, 98 S.Ct. 2943, 2950-2951, 57 L.Ed.2d 957 (1978). Title VII plaintiffs may also use statistics reflecting a general pattern of discrimination as some proof that the employer's stated reason for the employment decision is only a pretext. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05, 93 S.Ct. 1817, 1825, 36 L.Ed.2d 668 (1973); *but see* the caveat, *id.* at 805 n.19, 93 S.Ct. at 1825 (such generalized determinations may not be controlling as to an individualized hiring decision). Since intent is an element of a prima facie case of disparate treatment based on constitutional rights, statistics reflecting a presence or absence of discriminatory motive can be considered, although as in such Title VII cases, statistics will not be conclusive proof.

17. Plaintiffs attempted to admit evidence on the tradition of political patronage in the Sherrif's Department. *Arlington Heights* lists past discrimination as a factor relevant to intent. The trial court correctly concluded, however, that actions of past sheriffs were not relevant to Malcolm McCall's motives and would be highly prejudicial. *See City of Mobile v. Bolden*, _____ U.S. _____, _____, 100 S.Ct. 1490, 1503, 64 L.Ed.2d 47 (1980) (past discrimination is not an original sin that forever taints official action).

is available. *See Personnel Administrators of Massachusetts v. Feeney*, 442 U.S. at 274-80, 99 S.Ct. at 2293-2296; *see also City of Mobil v. Bolden*, _____ U.S. _____, _____, 100 S.Ct. 1490, 1501-1503, 64 L.Ed.2d 47 (1980). In this case, the objective manifestations do not supply inferences that rise to the level of proof of a subjective intent of political animus.

[12-14] A final point on the sufficiency of the evidence concerns the trial court's exclusion of some evidence on the training and experience of some appointees. Under Title VII, evidence of qualifications is part of a prima facie case of disparate treatment. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973). The Supreme Court held in *McDonnell Douglas* that a Title VII plaintiff meets his prima facie burden by proving that he was a qualified applicant who was a member of a racial minority group and who was rejected even though the position remained open and the employer continued to consider applicants with similar qualifications. 411 U.S. at 802, 93 S.Ct. at 1824. Direct proof of discrimination is not required, but the elimination of the two most common legitimate reasons for rejection—the plaintiff's lack of qualifications and the employers' lack of positions—creates an inference of discrimination sufficient to shift the burden of proof to the employer. *Teamsters v. United States*, 431 U.S. 324, 358 n.44, 97 S.Ct. 1843, 1866, 52 L.Ed.2d 396 (1977). If the employer articulates a legitimate, nondiscriminatory reason for the decision, the plaintiff can introduce evidence that the employer's justification is merely a pretext for discrimination. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 578-79, 98 S.Ct. 2943, 2950, 57 L.Ed.2d 957 (1978).

[15-17] Prima facie proof of a constitutional violation must include evidence of impermissible motive. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265, 97 S.Ct. 555, 563, 50 L.Ed.2d 450 (1977); *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1970); *Whiting v. Jackson State University*, 616 F.2d 116, 122 (5th Cir.

1980). Although *Arlington Heights* and *Davis* were equal protection cases, the same burden of proof has been imposed in first amendment cases arising under the due process clause of the fourteenth amendment. *Mt. Healthy City Board of Education v. Doyle* 429 U.S. at 287 n.2, 97 S.Ct. at 576 (citing *Arlington Heights*). A relevant question here is whether proof of the *McDonnell Douglas* factors is sufficient to shift the burden to the defendant in a case grounded on the Constitution. Just as the Court in *Davis* found disparate impact alone to be insufficient to prove discriminatory purpose in a constitutional case, so the mere elimination of two common reasons for rejection does not support an inference of discriminatory intent sufficient to shift the burden to a defendant charged with a constitutional violation. As the Court stated in *Furnco* regarding Title VII, "a prima facie showing under *McDonnell Douglas* [is not equivalent to] an ultimate finding of fact as to discriminatory refusal to hire." 438 U.S. at 576, 98 S.Ct. at 2949. Once a case is presented under Title VII using the standards set out in *McDonnell Douglas* or *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), plaintiff can delay producing other proof of intent until the employer proves job-relatedness, business necessity, or a legitimate nondiscriminatory reason for the action. Under the Constitution, however, that proof of intent is part of plaintiff's prima facie burden. Therefore, although proof of the appointees' training and experience was relevant, its exclusion was not reversible error in this case.

[18] Furthermore, review of the admitted and proffered evidence on plaintiffs' replacements and the proffer on other appointees convinces us that their training and experience do not support an inference of patronage. Campbell and Ugorek were not replaced.[18] Gnann, who replaced plaintiff Davenport, had experience as a patrol deputy, investigator, bank guard, and firefighter. He had prior on-the-job experience in corrections. Transcript at 88, 285. According to plaintiffs' proffer, Scism,

18. *See* section IV-D *infra*.

who replaced Tanner, was a college graduate with over ten years experience as a deputy for Lake County. Between 1972 and 1977 he worked for the Seminole County Sheriff's Department. Evidence and proffered testimony was supplied on the qualifications of only three of the investigators who might have replaced Carlisle.[19] Flavell had been a deputy investigating crime in Lake County for an unspecified period before 1972 and for some time under Sheriff Bliss. He was trained at the Orlando Police Academy and had prior experience with the Sanford Police Department. Secrease began as a deputy in 1966. From 1968 with Willis McCall to 1973 with Sheriff Bliss he was a uniformed investigator for Lake County. He had also been an officer with the Groveland Police Department. Sewell had been a deputy with Lake County for twenty-two years. From 1972 to 1977, he was a private investigator. Proffered evidence on the eight road deputies who might have replaced Knuth shows that they all were certified officers with prior training and law enforcement experience. Transcript at 117, 125-32.[20]

McCall was not hiring inexperienced political hacks. Many of the proffers included only evidence to support a meeting of minimum state requirements for certified law enforcement officers. Transcript at 131. Other experience and training qualifying the replacements for the positions was not included in the record. Furthermore, training and experience were not necessarily the only qualifications for these positions. McCall continually claimed he was searching for efficient employees who could work well with him. Personalities did play a role in his decisions and he naturally knew the working personalities of

19. These three may be the only new appointees among the six investigators. Joseficzyk was a Bliss employee. Whether DePetrillo and Worley were new appointees or Bliss employees was not stated. Nevertheless, since all employees were treated as applicants, evidence on the other three investigators would have been relevant.

20. Inexplicably, no evidence was proffered on John D. Hart, who was listed as one of the road deputies. As stated in note 4, testimony was proffered on other appointees who were not listed as road deputies. Their qualifications were also quite good. Only one of them began his law enforcement career as a Lake County deputy in 1977; he is a certified officer.

people with whom he had previously worked. Plaintiffs claim McCall was looking for loyalty, but even that may not have been impermissible, especially under the Florida system of strict liability for the acts of deputies. The Supreme Court has on occasion recognized that efficiency and loyalty can be valid governmental interests. *CSC v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 555, 564, 93 S.Ct. 2880, 2885, 2889, 37 L.Ed2d 796 (1973); *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968); *United Public Workers v. Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947); *see Elrod v. Burns*, 427 U.S. at 364-68, 96 S.Ct. at 2685-2687. Because we hold that plaintiffs did not supply sufficient evidence, we do not pass on whether McCall's interests in loyalty and efficiency would in this case outweigh the plaintiffs' interests.

[19] Plaintiffs did not meet their burden of proving that political discrimination was a substantial or motivating factor in McCall's employment decisions.

D. Causation

[20] For two plaintiffs, further reason exists for reversing the judgment.[21] McCall submitted evidence that he eliminated

21. In a pretrial opinion, the district court indicated that the burden of proving no other valid reason for discharge was on the plaintiffs, not McCall. *Tanner v. McCall*, 441 F.Supp. 503, 513-14 (M.D.Fla.1977). *See* note 7 *supra*. That McCall had relied on this pretrial opinion became apparent after the close of the evidence. Transcript at 569. McCall might have offered causation evidence on all plaintiffs, as he did at the post-trial hearing on reinstatement, were it not for that ruling. On cross-examination, Tanner and Davenport were asked about interview questions McCall had asked them on incidents which might have supplied independent reasons for failure to rehire them. *Id.* at 432-35, 458-60. Carlisle testified on direct that McCall said he had been told bad things about Carlisle by the Leesburg Police Chief and the Florida Highway Patrol "[a]nd as a result he wished [Carlisle] the very best and hoped [he] could get a job in the neighboring county . . . ." *Id.* at 362. McCall never testified, however, that these incidents were motivating factors in his decisions. *See id.* at 77-78 (McCall did not want to "hang any laundry out on the line for these gentlemen or this lady"). Despite the pretrial order, *Mt. Healthy* clearly places on the defendant the burden of proving independent reasons for discharge. McCall did not meet this burden during trial for any plaintiffs other than Campbell and Ugorek.

the positions held by plaintiffs Campbell and Ugorek. Plaintiffs did not rebut this proof with competent evidence. If the first amendment motive is not the "but for" reason for the refusal to reappoint plaintiffs, their section 1983 action fails. *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 416-17, 99 S.Ct. 693, 697, 58 L.Ed.2d 619 (1979); *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 285-87, 97 S.Ct. 568, 575-576, 50 L.Ed.2d 471 (1977).

As to Campbell, the jury specifically asked whether the number of secretaries was reduced when McCall took office. Transcript at 651. The court instructed the jury to use its best recollection of the evidence to answer their question. *Id.* at 662-63. A review of the transcript uncovers no competent evidence that the position remained open. Although Campbell disputed it, both Sheriff Bliss and Sheriff McCall testified that Campbell had been the chief deputy's secretary. *Id.* at 144, 171-172, 475-76, 488. The uncontradicted testimony was that McCall eliminated this position; the chief deputy's work is now done by the sheriff's secretary. *Id.* at 112-13, 144. In addition, the office staff was reduced from thirteen employees to twelve. Campbell was the only one of thirteen office employees not reappointed. The current office manager testified that she supervises the eleven other office employees. *Id.* at 173. The evidence was insufficient to support a jury verdict for Campbell.[22]

22. Campbell relied on the following testimony which she gave on cross-examination, to establish that the number of secretaries had not been reduced:

> Q. Do you know whether anybody has been employed in the same position that you held prior to January of '77?
>
> A. There have been, as I understand it, three women hired in the office. I don't know exactly what their jobs are.

Transcript at 488. Not only does this testimony fail to prove that the total number of office workers was thirteen or more, but it also does not indicate the source of the information, the jobs the new employees took, or the date when these employees were hired. This testimony was of insufficient probative value to raise a jury question. *See Robertson v. Emory University Hospital*, 611 F.2d 604, 608 (5th Cir. 1980); *Boing Company v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc).

Even less testimony can be culled from the record concerning Ugorek's position. McCall testified that he eliminated the position of senior sergeant supervisor. Transcript at 87-88. No contradictory evidence was submitted. No evidence indicates whether Ugorek could or should have been considered for another position. McCall therefore met his burden of showing an independent reason for not appointing Ugorek, which is further reason for reversing the judgment for Ugorek.

V. CONCLUSION

The judgments for plaintiffs Campbell, Carlisle, Davenport, Knuth, and Ugorek are REVERSED. The judgment against plaintiff Tanner is AFFIRMED on other grounds. The denial of a permanent injunction is AFFIRMED. The award of fees and costs to prevailing plaintiffs is REVERSED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

BOBBY F. TANNER, et al.,
Plaintiffs,
v.
MALCOLM McCALL, etc.,
Defendant.

NO. 77-2-Civ-Oc

ORDER

For the reasons set forth in the Court's opinion of this date, it is now

ORDERED:

1. Defendant's motion for judgment in accordance with his motion for directed verdict is denied.

2. Defendant's motion for a new trial is denied.

3. Plaintiffs' motion for permanent injunctive relief is denied.

4. Plaintiffs' motion to strike defendant's response to plaintiffs' permanent injunction motion is granted.

5. Defendant's response to plaintiffs' motion of permanent injunctive relief is stricken as unnecessary.

6. Defendant's motion for a bifurcated hearing on the post-judgment motions in this case is denied.

7. Plaintiffs' motion for front and back pay is denied.

8. Defendant's motion to amend the judgment in this case is granted.

9. The Clerk of the Court is directed to prepare an amended final judgment against defendant in his official capacity only, as the Sheriff of Lake County, Florida.

10. Plaintiffs' motion to reconsider whether defendant is individually liable is denied.

11. Plaintiffs' motion to tax costs is granted as to the $227.75 for duplication expenses; is denied as to the $50.89 in long distance telephone calls; and is left undecided concerning travel, lodging, and meals expenses during depositions, hear-

ings, and trial of this case, pending an itemization of those costs by plaintiffs.

12. The motion of plaintiff Bobby F. Tanner for a new trial is denied.

DONE and ORDERED at Jacksonville, Florida, this 9th day of August, 1978.

/s/

Senior United States District Judge

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

BOBBY F. TANNER, et al.,
Plaintiffs,
v.
MALCOLM McCALL, etc.,
Defendant.

NO. 77-2-Civ-Oc

OPINION

Subject Matter Jurisdiction

After trial of this case, jury verdict, and entry of final judgment, numerous motions by plaintiffs and defendant have been filed. On May 5, 1978, the Court ordered counsel for plaintiffs and defendant to brief the question whether the Court has subject matter jurisdiction to permit an award of damages and monetary relief such as the jury verdict.

The Court is now convinced that it has federal question jurisdiction under 28 U.S.C. §1331 for the purpose of allowing monetary relief for plaintiffs. Consequently, the Court will proceed to rule on the remaining motions in this case.

Defendant's Motion for Judgment in Accordance with his Motion for a Directed Verdict

Defendant has moved for judgment in accordance with his motion for directed verdict at the close of all the evidence of the case. At that time, the Court declined to rule on that motion, reserving a ruling until after the jury returned its verdict. Defendant contends that there was not sufficient evidence, direct or circumstantial, upon which the jury could base its verdict for five of the six plaintiffs. The Court cannot agree. There was presented at trial enough circumstantial evidence from which the jury could properly find a causual chain of facts upon which to base its verdict. This Court will not attempt to read behind

that verdict, or to second-guess the jury's reasoning that resulted in that verdict.

Defendant's Motion for a New Trial

Similarly, with defendant's motion for a new trial, the Court cannot conclude that the jury verdict in this case was unwarranted and without sufficient evidence to justify it. Consequently, for the same reasons, the Court will deny both the motion for judgment in accordance with defendant's motion for a directed verdict at the close of all of the evidence, and defendant's motion for a new trial.

Plaintiffs' Motion for Permanent Injunctive Relief

Plaintiffs have moved for permanent injunctive relief, following the jury verdict which awarded damages for five of the plaintiffs in an amount totaling $85,000.00. Plaintiffs wish the Court to order their reinstatement as deputies in the Lake County Sheriff's Department. At the hearing on the motions in this case, plaintiffs conceded that such an equitable remedy is within the sound discretion of the Court. Further, plaintiffs acknowledge that the gist of their request for injunctive relief is for a mandatory injunction.

There are several reasons why the Court will exercise its discretion to deny the request for permanent injunctive relief. First, injunctive relief is always an equitable remedy, which is warranted only when there is no adequate remedy at law. In this case, however, it is clear that plaintiffs have an adequate remedy at law and have received it. A jury after trial in this case returned a verdict favorable to five of the six plaintiffs awarding a total of $85,000.00 in damages to them. The purpose of an award of damages is to compensate a person for injury or loss sustained. An award of damages has always been a remedy at law. Hence, plaintiffs have not sustained irreparable injury by virtue of the fact that they have been compensated by an award of legal damages for their injury. In the absence of any showing of irreparable injury, the Court must conclude that the equitable relief of a permanent injunction, requiring defendant to reappoint plaintiffs, is unwarranted.

Second, the damage which a wholescale reinstatement of all of the plaintiffs would cause to defendant, as well as to other deputies who are presently employed and who would be displaced from their jobs, far outweighs any injury to plaintiffs from refusing to order their reappointment.

Third, the court notes that under Florida law, *Fla. Stat.* §30.07 and §30.09(3), defendant is strictly liable as Sheriff of Lake County for the acts of his deputies. Ordering him to reappoint deputies with whom he has no rapport, in whom he has no confidence, and for whom he has found acceptable replacements, would place defendant in a precarious position of liability under Florida law for whatever conduct plaintiffs might engage in as reinstated deputies.

Finally, the harm that would result to those deputies who are presently employed who would be displaced from their jobs by ordering the reinstatement of plaintiffs, is probably unredressable. Those deputies, unlike the plaintiffs in this case, do not appear to have cause of action to remedy their losses and damages suffered if they should suddenly loose their employment. Balancing all the equities and factors considered, the Court finds that plaintiffs have received an adequate remedy at law under their constitutional cause of action, and that the harm that defendant and his present deputies might suffer by mandatorily ordering plaintiffs' reappointment as deputies, far outweighs any need for the equitable remedy of a mandatory injunction.

Plaintiffs' Motion to Strike
Defendant's Response to Plaintiffs'
Permanent Injunction Motion

Plaintiffs have moved to strike defendant's response to their motion for a permanent injunction. In that response, defendant incorporates numerous documents which he alleges show that plaintiffs are not qualified for reappointment as Sheriff's deputies and that requiring their reappointment would result in a detriment to the Lake County Sheriff's Department. Because the Court has decided to deny plaintiffs' motion for permanent injunction, premised on the reasons already discussed, it is unnecessary for the Court to consider the extraneous, post-trial matters which defendants wishes to present

Plaintiffs' Motion to Reconsider Whether Defendant Is Individually Liable

For the reasons set forth in the Court's May 5, 1978, order, and in accordance with the Court's decision to amend the judgment in this case, plaintiffs' motion to reconsider whether defendant is individually liable is denied.

Plaintiffs' Motion to Tax Costs and Defendant's Objections

Plaintiffs have moved the Court to tax costs in this case. Defendant objects to the taxation of only three items of costs: (1) $227.75 for making 911 Xerox copies; (2) $971.57 for travel, lodging, and meals during discovery depositions, hearings, and trial; and (3) $50.89 in long distance calls on behalf of clients. The Court is able to rule on two of those objections, but will require plaintiffs to itemize the particular expenses for the individual plaintiffs' travel costs during depositions, hearings, and trial. First, under 28 U.S.C. §1920(4), the Court has discretion to award the taxation of fees for exemplification, duplication, and copying after a factual determination that such items were "necessarily obtained for use in the case." *United States v. Lynd*, 334 F.2d 13, 19 (5th Cir. 1964). The Court believes that the duplication costs are expenses reasonably justified for preparation and use in this case. Accordingly, the Court will overrule defendant's objection to the amount of $227.75 for making Xerox copies. On the other hand, the Court believes that long distance telephone costs incurred are not properly taxable items of cost. Therefore, the Court will sustain defendant's objection to that item and will deny the taxation of $50.89 in long distance telephone calls as costs for plaintiffs. Finally, the Court will require plaintiffs to itemize and segregate the various travel and lodging costs incurred by the different plaintiffs during discovery, hearings, and trial of this case. Unless and until plaintiffs so itemize those costs, the Court will not allow the taxation of any of them.

Plaintiff Bobby F. Tanner's Motion for a New Trial

Plaintiff Bobby F. Tanner moves the Court to grant him a new trial. Although the jury returned verdicts on behalf of five

now. Consequently, the Court will grant plaintiffs' motion to strike defendant's response to their motion for permanent injunction.

Defendant's Motion for a Bifurcated Hearing on Postjudgment Motions

Similarly, defendant's motion for a bifurcated hearing, in which the Court would hear all of the other posttrial motions, but would wait to hear plaintiffs' permanent injunctive relief, is unnecessary in view of the Court's decision to deny plaintiffs' injunction motion. Consequently, the Court will deny defendant's motion for a bifurcated hearing.

Plaintiffs' Motion for Front and Back Pay

The Court has upheld the jury's verdict in this case. When the jury was charged concerning the law, it was instructed about the loss of income as an element and measure of damages. It must be presumed that the jury considered that element of damages in deciding each of its verdicts for the five plaintiffs who prevailed. The Court will not invade the jury's province in an attempt to divine what the verdicts were intended to supply as relief. Furthermore, if the Court were to award back pay to plaintiffs in addition to the jury verdicts, (1) it would necessarily entail the assumption that the jury's verdict omitted plaintiffs' loss of income, or (2) it would result in a double award of lost income. Either consequence is unacceptable to the Court.

Plaintiffs' motion for front pay is moot in view of the Court's decision not to order their reinstatement.

Defendant's Motion to Amend the Judgment

In the order of May 5, 1978, the Court held, "as it held on March 9, 1978, that this case, under all the evidence presented, must proceed," and any judgment be entered, against defendant in his official capacity only, as the Sheriff of Lake County, Florida. The Court will grant defendant's motion and will order an amended judgment to be prepared.

other plaintiffs against defendant, the jury refused to return a verdict for plaintiff Bobby F. Tanner. For the same reasons that the Court denied defendant's motion for a new trial, the Court must also deny plaintiff Bobby F. Tanner's motion for a new trial. Furthermore, in plaintiff Tanner's case, the question of confidential or policy-making status was one of mixed fact and law, which the jury apparently decided adversely to plaintiff Tanner's assertions. The Court will not undermine the jury verdict by trying to second-guess or redecide the questions within its province.

Issued at Jacksonville, Florida, this 9th day of August, 1978.

/s/

Senior United States District Judge

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

BOBBY F. TANNER, et al.,
Plaintiffs,
v.
MALCOLM McCALL, etc.,
Defendant.

NO. 77-2-Civ-Oc

SUMMARY FINAL JUDGMENT

For the reasons set forth in the Court's order and opinion of this date, it is now

ORDERED and ADJUDGED:

1. Plaintiffs shall take nothing on their claims for denial of due process and for stigmatization.

2. This action, insofar as it involves plaintiffs' claims for denial of due process and for stigmatization, is dismissed on the merits.

ORDERED and ADJUDGED at Jacksonville, Florida, this 20th day of October, 1977.

/s/

Judge

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

BOBBY F. TANNER, et al.,
Plaintiffs,
v.
MALCOLM McCALL, etc.,
Defendant.

NO. 77-2-Civ-Oc

OPINION

Plaintiffs have moved for a preliminary injunction and defendant has moved for summary judgment. Plaintiffs are former deputies of the Sheriff of Lake County, Florida, and defendant is the Sheriff. Three issues are presented by these motions: first, whether plaintiffs had a property interest (de facto or de jure) in their employment as Lake County Sheriff's deputies, which they were deprived of without the fundamental due process guaranteed by the Fourteenth Amendment; second, whether plaintiffs' First Amendment freedoms have been infringed by termination from their employment solely because of their political affiliation; and third, whether plaintiffs' liberty interest under the Fourteenth Amendment has been violated by having their reputations as law enforcement officers stigmatized so that they are hindered from finding new law enforcement work.

FACTS

In November, 1976, the incumbent Sheriff of Lake County, Florida ('Sheriff Bliss') was defeated by defendant in an election. At that time, plaintiffs had all been deputies under Sheriff Bliss for several years; and all plaintiffs but one have been in law enforcement work for more than ten years. There is no evidence that plaintiffs were anything other than satisfactory employees. On or about January 4, 1977, after personally interviewing nearly all of the employees of the sheriff's department, defendant terminated plaintiffs' employment, along with about

a dozen other employees. All of the plaintiffs supported their then-employer, the incumbent Sheriff Bliss, in the election that he lost to defendant.

Summary Judgment: Two Criteria

Defendant has moved for summary judgment, to which he is entitled, in part or altogether, only if he meets his burden to show (1) the absence of any genuine issues of material fact on any or all of plaintiffs' claims, and (2) the right to a summary judgment on any or all of those claims under the indisputable dictates of the law. *FED.R.CIV.P.* 56; *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 26 L.Ed.2d 142 (1968); *Poller v. CBS, Inc.*, 368 U.S. 464, 7 L.Ed.2d 458 (1962); *Eberhardy v. GMC*, 404 F.Supp. 826, 829 (M.D. Fla. 1975) *aff'd sub nom. Van Eberhardy v. GMC*, 534 F.2d 1406 (5th Cir. 1976). If, as a matter of federal law, *Lighting Fixture & Elec. Supply Co. v. Continental Ins. Co.*, 420 F.2d 1211, 1213 (5th Cir. 1969), real litigable issues exist, the parties must be allowed to try them; and summary judgment would be improper. *Insurance Co. of N. Ameri. v. Bosworth Constr. Co.*, 469 F.2d 1266, 1268 (5th Cir. 1972); *United States v. Burket*, 402 F.2d 426, 430 (5th Cir. 1968). Where, however, as a matter of federal law, some or all issues raised are wells without the water of legal merit, trial of those issues would be wasteful and unnecessary. *Tyler v. Vickery*, 517 F.2d 1089, 1094-95 (5th Cir. 1975). Summary judgment, then, is expedient and warranted as "a valuable tool in the law's effort to stem the tide of flooding litigation." *DeBardeleben v. Cummings*, 453 F.2d 320, 326 (5th Cir. 1972).

First Issue: Property Interest

"A terminated or non-renewed public employee is entitled" to the due process safeguards of the Fourteenth Amendment "only if his termination or non-renewal is a deprivation of liberty or property interests." *Siler v. Brady Indep. School Dist.*, 553 F.2d 385, 387 (5th Cir. 1977) citing *Board of Regents v. Roth*, 408 U.S. 564, 571-72, 33 L.Ed.2d 548, 557-58 (1972); *Stewart v. Bailey*, 556 F.2d 281, 285 (5th Cir. 1977); *Thurston v. Dekle*, 531 F.2d 1264, 1271 (5th Cir. 1976). In *Board of Regents v. Roth, supra*, the Supreme Court stated that property interests "may take many forms." *Id.* at 576, 33 L.Ed.2d at 560. The existence of genuine property interests is

not a matter of the effect of federal, constitutional law, however. *Id.* at 577, 33 L.Ed.2d at 561.

> Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. *Id.*

Recently, the Supreme Court reaffirmed this analysis of 'property interest,' *Bishop v. Wood*, 426 U.S. 341, 48 L.Ed.2d 684 (1976);

> A property interest in employment can, of course, be created by ordinance, or by an implied contract. In either case, however, the sufficiency of the claim of entitlement must be decided by reference to state law. *Id.* at 344, 48 L.Ed.2d at 690.

In *Bishop v. Wood*, a discharged city police officer claimed that he was deprived of a property interest in his job without the procedural safeguards of due process. He argued that a city ordinance allowing dismissal of permanent employees for persistently unsatisfactory performance created an employment tenure; and that such a tenure was a property interest requiring the fundamentals of due process before it could be removed. The ordinance had not been construed by any state courts, and the district judge interpreted it from his many years of experience with legal practice in the state. *Id.* at 345, 48 L.Ed.2d at 690. The ordinance was ambiguous enough to accommodate different interpretations, *id.*, and the Court of Appeals eventually divided evenly over it. *Id.* at 346, 48 L.Ed. at 691. The Supreme Court held that the district court's interpretation was both possible and tenable; that it derived indirect support from a state supreme court decision; and that the Court of Appeals's acceptance of the interpretation foreclosed the high court's independent reassessment of it. *Id.* at 345-47, 48 L.Ed.2d at 690-91.

On the other hand, the Fifth Circuit interpreted a municipal civil service board rule, permitting suspensions and

dismissals of an employee for cause only, as creating a legitimate property interest in continued employment that could "not be taken away without due process." *Thurston v. Dekle*, 531 F.2d at 1272.

A divided panel of the Fifth Circuit, in *Stapp v. Aveyelles Parish School Bd.*, 545 F.2d 527 (5th Cir. 1977) decided that a school board superintendent's letter of intent to a non-tenured, probationary principal created a de facto, objective expectations of continued employment, amounting to a protected property interest. *Id.* at 533-34. That decision is problematic, however, because it constitutes a federal court's ruling that specific individual conduct by the superintendent could create an employment property interest, despite established state law to the contrary. *Id.* at 535-37 (Jones, J., dissenting).

Siler v. Brady Indep. School Dist., 553 F.2d 385 (5th Cir. 1977), is more closely in line with *Bishop v. Wood, supra,* and *Board of Regents v. Roth, supra,* by the Supreme Court, as well as *Thurston v. Dekle, supra,* by the Fifth Circuit. The plaintiff in *Siler v. Brady Indep. School Dist., supra,* had been a school teacher employed by a school district under two successive one-year contracts. During the life of the second contract, the school district was annexed by the defendant school district. A resolution by the board of the defendant school district at approximately the time of the merger declared that (1) the defendant-successor school district would honor the current contracts between the predecessor school district and its teachers, and (2) at expiration of those contracts, the teachers of the predecessor school district would stand on equal footing with, and be treated the same as, the successor school district's own teachers. Throughout that school year, the plaintiff encountered a "continuing series of difficulties with the principal of the school" where the plaintiff taught. *Id.* at 387. Consequently, the principal did not recommend plaintiff's re-employment; and the board of the defendant school district endorsed non-renewal of plaintiff's contract. The plaintiff was granted an appearance before the board, but the board denied his request for reconsideration and sent him a lengthy list of performance deficiencies.

The district court held that (1) the board's procedures satisfied due process requirements, since (2) the plaintiff did not

have a property interest which the Fourteenth Amendment would protect. Searching for a state law origin for the plaintiff's claim of de facto property interest, the Court of Appeals found that Texas law does not recognize a de facto tenure from even a lengthy service of successively renewed, one-year contracts. *Id.* at 388. The Court of Appeals affirmed the district court's ruling that the plaintiff had no protectable property interest under state law. *Id.* at 388, 389.

Finally, in *Stewart v. Bailey*, 556 F.2d 281 (5th Cir. 1977) a college teacher was terminated during the life of his one-year contract. The grounds for his termination were insubordination and willful disobedience of rules and regulations. The plaintiff alleged that his First Amendment right to freedom of speech was denied, that his property interest under state law was impaired without the protections of Fourteenth Amendment procedural due process, and that his liberty interest was infringed by denigration of his good name, reputation, and integrity. However, before his discharge became effective, the plaintiff submitted a letter of resignation effective at a later date. The resignation was accepted. The plaintiff had taken that tactic to enable him "to obtain a favorable job reference." *Id.* at 284. Not until a year later did he file suit.

The Court of Appeals, affirming the district court, found no evidence in the record to support the First Amendment, freedom-of-speech claim. On the issues of procedural due process to protect a property interest, and pejorative infringement of a liberty interest, the court held that (1) the college had met its initial duty to provide the plaintiff with a due process forum; but, (2) by submitting his resignation for his own advantages, the plaintiff deliberately waived his right to due process and excused the college from any further Fourteenth Amendment obligations. *Id.* at 285-86.

When the present case was begun, plaintiffs claimed a de jure property interest under *Fla. Stat.* §112.531 *et seq.*, "The Police Officers' Bill of Rights." Previously, the applicability of that statute to create a property interest for sheriffs' deputies was "an open and undecided question." *Tanner v. McCall*, 425 F.Supp. 257, 258 (M.D.Fla. 1977); *see Schrank v. Bliss*, 412 F.Supp. 28, 41 and nn. 9 and 10 (M.D.Fla. 1976). Florida appellate courts have uniformly ruled, however, that Florida

sheriffs do not "come within the purview" of *Fla. Stat.* §112.531(2), "absent some other statutory exception to the contrary." *Tanner v. McCall*, 425 F.Supp. at 258, citing *Evans v. Hardcastle*, 339 So.2d 1150, 1151 (2d D.C.A. Fla. 1976); *Johnson v. Wilson*, 336 So.2d 651, 652 (1st D.C.A. Fla. 1976). This court, therefore, held that "plaintiffs in this case, as former deputies sheriff, are not included within the scope of the statutory rights created and conferred" by *Fla. Stat.* §112.531 *et seq. Tanner v. McCall*, 425 F.Supp. at 258.

> Hence, without considering or prejudicing plaintiffs' claims (and right to establish those claims) of property interests derived from other source . . .

the Court struck the allegations and claims of entitlement under *Fla. Stat.* §112.531 *et seq.* "as contrary to the decisional law of Florida." *Id.*

Plaintiffs propose that *Fla. Stat.* §447.209 of the Public Employees Relations Act ('PERA')[1] creates a de jure property interest in their jobs as deputies. That section, however, rather than conferring a general property interest upon public employees of Florida, expressly reserves to employers the traditional management prerogatives that are involved in operating a business, insofar as they are not exploited (1) to refuse contractually obligatory grievance procedures, or (2) to commit unfair labor practices.

Plaintiffs have no de jure right to continued employment, and the Court now will consider their claims of de facto property interest. Plaintiffs argue that this Court's decision in *Schrank v. Bliss, supra,* found that the former sheriff of the same county had established a de facto expectation of continued employment by means of the system of probationary and permanent employees. 412 F.Supp. at 37, 40-41. That finding, "while firm for the purpose of issuing" a preliminary injunction, was expressly declared to be "tentative and not binding with respect to the court's ruling and final judgment on the merits . . ." *Id.* at 42. *See also Jacksonville Maritime Ass'n v. Local 1408-A, Internat'l Longshoremen's Ass'n.*, 424 F.Supp. 58, (M.D.Fla. 1976); *Poe v. Charlotte Memorial Hosp.*, 374 F.Supp. 1302,

1212 (W.D.N.C. 1974). *Schrank v. Bliss, supra*, was ultimately dismissed voluntarily by agreement of the parties, and the court never reached the merits of the de facto property-interest claim.

In the present posture of this case, however, the Court can determine the merits of that claim. While plaintiffs' preliminary injunction motion does not permit such a ruling, defendant's summary judgment motion does. Sheriff Bliss, the defendant in *Schrank v. Bliss, supra*, and the incumbent predecessor of defendant in this case, continues to maintain that the distinction between probationary and permanent deputies under his administration was a merit-monetary one only. Deposition at 5-7. Consistent with his position in *Schrank v. Bliss*, 412 F.Supp. at 41, Sheriff Bliss continues to insist that 'permanent' did not mean that a deputy acquired a tenured status, dischargeable only for cause. Deposition at 7. The Court need not decide what were the legal consequences of being a permanent deputy under Sheriff Bliss. All of the evidence, documents and depositions conclusively reveal the lack of any showing that such a probationary-permanent classifications system, even if it might have created an objective property interest, had been adopted and carried on by Sheriff Bliss' successor, defendant in this case. Additionally, the depositional testimony of all plaintiffs in this case uniformily establishes that their expectations of continued employment were based on their own, personal beliefs. In short, their property interests are subjectively, not non-subjectively, founded. The Court concludes that plaintiffs had no property interests, under Florida law, in their jobs as Lake County Sheriff's deputies. Therefore, no Fourteenth Amendment due process guarantees are required.

SECOND ISSUE:
Stigmatization—Injury to Reputation, Good Name, and Integrity

In *Perry v. Sinderman*, 408 U.S. 593, 33 L.Ed.2d 570 (1972), the Supreme Court declared that the Fourteenth Amendment will protect a public employee whose constitutional liberties are infringed by his termination, even if he did not have a property interest in his employment that would be protected by the Due Process Clause. *Id.* at 596-99, 33 L.Ed.2d at 577-78. The Court explained in further detail that declaration in *Paul v. Davis*, 424 U.S. 693, 47 L.Ed.2d 405 (1976). The Court distinguished between mere injuries to ones good name or reputation alone, and an injury to good name or integrity in conjunction with the denial of interests that enjoy the protection of the Due Process Clause. *Id.* at 706, 709, 710-12, 47 L.Ed.2d at 416-17, 418, 419-20. Those interests that are guaranteed the protection of fundamental due process are liberty or property interests (1) created by state law or (2) guaranteed by the Bill of Rights "independently of state law;" *Id.* at 710-11 and n. 5, 47 L.Ed.2d at 419 and n. 5; and public employment is one property interest that arises from state law. *Id.* at 706, 47 L.Ed.2d at 416-17. *See Bishop v. Wood*, 426 U.S. at 344 and n. 7, 48 L.Ed.2d at 690 and n. 7; *Board of Regents v. Roth*, 408 U.S. at 577, 33 L.ED.2d at 561.

The Supreme Court recently reaffirmed that principle in *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 50 L.Ed.2d 471, 481 (1977). Earlier, in *Board of Regents v. Roth, supra*, the Court had discussed that principle (which was originally stated in *Perry v. Sinderman, supra*, and further explained later in *Paul v. Davis, supra*) in connection with a liberty interest in one's reputation, good name, and integrity as it affected the ability to carry on a job or practice a profession. The Court stated in *Board of Regents v. Roth, supra*, that "where a person's good name, reputation, honor, or integrity is at stake" in a decision not to continue his employment, the fundamentals of due process are required. 408 U.S. at 573, 33 L.Ed2d at 558-59. In fact, as the Court explained, if such a stigmatization had been involved in *Board of Regents v. Roth, supra*, the decision about the necessity for basic due process would have been

different, notwithstanding the ultimate absence of a genuine property interest under the relevant state law. *Id.*

The upshot of those decisions, with respect to stigmatization, is that one must meet the "stigma-plus" test to assert a claim for fundamental due process under §1983. *Moore v. Otero*, 457 F.2d 435, 437 (5th Cir. 1977); *Sullivan v. Brown*, 544 F.2d 279, 283-84 (6th Cir. 1976); *Colaizzi v. Walker*, 542 F.2d 969, 973-74 (7th Cir. 1976); *Stretten v. Wadsworth Veterans Hosp.* 537 F.2d 361, 365-66 (9th Cir. 1976). It is not necessary that a plaintiff ultimately prevail on his claim to a property interest or liberty interest. A plaintiff need only allege the denial of a property or liberty interest that is arguable or putatively plausible under state law or the Bill of Rights, in order to allege as well a federal claim for stigmatization of reputation, good name, or integrity. *See, e.g., Colaizzi v. Walker*, 542 F.2d at 972-74; *Stretten v. Wadsworth Veterans Hosp.* 537 F.2d at 365-66.

In *Paul v. Davis, supra*, and in every decision following it, the plaintiff's federal claim of stigma was denied from the outset, either by dismissal or by summary judgment, because the denial of a plausible property or liberty interest, under state law or the Bill of Rights, was not alleged. In *Sullivan v. Brown*, 544 F.2d 279 (6th Cir. 1976), the internal disciplinary transfer of a teacher did not allege the denial of any property or liberty interest under Tennessee law. *Id.* at 282-83. Hence, the teacher's allegation of stigmatization to her reputation a priori failed to state a federal claim entitled to the protection of fundamental due process. *Id.* at 283-85.

Similarly, in *Moore v. Otero*, 557 F.2d. 435 (5th Cir. 1977), a municipal police officer's internal, disciplinary transfer from corporal to patrolman did not allege the denial of any property or liberty interest under the law of Florida or the City of Tampa. *Id.* at 436-37. Thus, the policeman failed as well to state a federal claim for stigmatization that would entitle him to basic due process. *Id.* at 437-38. *See also Confederation of Police v. City of Chicago*, 547 F.2d 375, 376 (7th Cir. 1977).

An attorney who had been intemperately and injudiciously denounced in open court by a state judge, in *Dean v. Shiver*, 547 F.2d 227 (4th Cir. 1976) sued the judge under 42 U.S.C. §1983. Insofar as his claim might have been for the stigma suffered by

the juridical slander, it was deficient because of the lack of any arguable property or liberty interest that was threatened. *Id.* at 229.

In *Walker v. Cahalan*, 542 F.2d 681 (6th Cir. 1976), a criminal defendant who had served eighteen years of a life sentence for first-degree murder, obtained post-conviction relief in a Detroit municipal court. The prosecutor, when refused leave to appeal the decision to the Michigan Court of Appeals, decided to nolle prosequi the murder charge. However, when a state senator introduced a bill in the Michigan legislature to compensate the criminal defendant for his years spent in prison, the prosecutor disseminated a letter deploring the notion that the criminal defendant was an innocent man, unjustly imprisoned and deserving restitution. A *Detroit News* columnist wrote a story based on the case and on the prosecutor's letter. The criminal defendant sued the prosecutor and the journalist. The Court of Appeals held that no federal stigmatization claim under §1983 was alleged because the plaintiff was unable to assert the denial of any property or liberty interest under state law. *Id.* at 683-84.

Plaintiffs claim that their discharges by defendant imposed scandalous stigmata upon their reputations and good names; that they are greatly disabled in obtaining new employment as a result of their stigmatization; and that they have not had an opportunity to eradicate it in a forum of fundamental due process. They rely chiefly upon the obligatory certification system, by the State of Florida's Department of Criminal Law Enforcement's Bureau of Standards, in the Division of Standards and Training. In order to become eligible for employment as a law enforcement officer in the state, every candidate must be certified as qualified under the minimum standards of the Bureau, after successfully completing a mandatory, basic course of training. Once a law enforcement employee is no longer employed, the employer must notify the Bureau of Standards which removes the officer's certificate from active status until his re-employment.

In *Schrank v. Bliss*, 412 F.Supp. at 33, 41, this Court found that, for the purposes of enjoining the defendant, the state law enforcement certification system contributed to a stigmatizing of the plaintiff's good name and reputation. Plaintiffs seek the

Court to rule similarly for them. The factual circumstances in *Schrank v. Bliss, supra,* were different, however. Not only was the state bureau of standards notified that the plaintiff was no longer employed, a letter was sent by the defendant informing the bureau that the plaintiff "had been terminated involuntarily for insubordination." *Id.* at 33. Additionally, the defendant had freely heralded to the news media his accusations that the plaintiff had been fired for insubordination and unseemly conduct. *Id.* at 33-34, 41.

In the present case, there have been neither allegations nor evidence of any publicized deprecation of plaintiffs by defendant. Defendant's own position, expressed in his deposition, was that he had no negative evaluation of plaintiffs, but merely replaced them as the act of an employer's discretionary judgment in striving for the greater benefit of the Sheriff's department. Deposition at 67. Moreover, without exception, when asked at deposition, the plaintiffs were unable to point to a single objective instance where their good names, integrity, or reputations have been stigmatized by defendant. The Court concludes that plaintiffs have stated no federal claim, under §1983, that their good names, reputations, and integrity have been stigmatized. Consequently, they are not entitled to the basic guarantees of Fourteenth Amendment due process for such claims.

THIRD ISSUE:
Infringement of First Amendment Freedoms—
Politically Discriminatory Discharges

While the liberties guaranteed by the First Amendment are not absolute, *Elrod v. Burns*, 427 U.S. 347, 360, 49 L.Ed.2d 547, 558, (1976), they are so fundamental to the freedom of society under the American form of constitutional democracy that any denial of those liberties is subject to strict scrutiny. *Id.* at 362; 49 L.Ed.2d at 559; *Buckley v. Valeo*, 424 U.S. 1, 64-65, 46 L.Ed.2d 659, 713-14 (1976); *NAACP v. Alabama*, 357 U.S. 449, 460-61, 2 L.Ed.2d 1488, 1498-99 (1958); *Stevens v. Berger*, 428 F.Supp. 896, 906 (E.D.N.Y. 1977). In order to justify abridging or denying First Amendment freedoms, a government

must show not only a legitimate governmental interest, but also a compelling and overwhelming need to achieve that interest at the cost of basic liberties, by means that are the least restrictive ones possible. *Kusper v. Pontikes*, 414 U.S. 51, 58-59, 38 L.Ed.2d 260, 267-68 (1973); *Williams v. Rhodes*, 393 U.S. 23, 31-34, 21 L.Ed.2d 24, 31-33 (1968); *Keyishian v. Board of Regents of SUNY*, 385 U.S. 589, 602-04, 17 L.Ed.2d 629, 640-41 (1967); *NAACP v. Button*, 371 U.S. 415, 438-39, 9 L.Ed.2d 405, 421-22 (1963); *Bates v. City of Little Rock*, 361 U.S. 516, 524, 4 L.Ed.2d 480, 486 (1960); *NAACP v. Alabama*, 357 U.S. at 464-66, 2 L.Ed.2d at 1500-02; *United Public Workers v. Mitchell*, 330 U.S. 75, 95-96, 91 L.Ed. 754, 770-71 (1947); *Thomas v. Collins*, 323 U.S. 516, 529-32, 89 L.Ed. 430, 439-41 (1945); *Division 241, Amalg. Transit Union v. Suscy*, 538 F.2d 1264, 1266 (7th Cir. 1976); *Stevens v. Berger*, 428 F.Supp. at 906.

In *Elrod v. Burns, supra*, the Supreme Court settled that the highly valued freedoms of the First Amendment remain inviolable in public employment situations. The plaintiffs in *Elrod v. Burns, supra*, were Republican employees of the Cook County, Illinois Sheriff's Office, not protected by an objective tenure of employment such as civil service. They were all terminated or threatened with termination by a successor sheriff, a Democrat. There was no question that the spoils system of partisan politics was the cause. The Supreme Court held that, regardless of the existence of a property right in ones job under state law, a public employee who is neither in a policy-making nor in a confidential capacity may not be discharged or threatened with discharge, solely because of his political beliefs and affiliations. 427 U.S. at 373, 49 L.Ed.2d at 565, and 427 U.S. at 375, 49 L.Ed.2d at 566 (Stewart & Blackmun, JJ, concurring). Such politically discriminatory discharges violate the rudimentary liberties of the First Amendment, to freely believe, speak, and affiliate as one chooses.

The Supreme Court's decision in *Elrod v. Burns, supra*, was consistent with earlier pronouncements by the Court concerning fundamental constitutional freedoms. In *Perry v. Sinderman, supra*, the Court, while finding no de jure property interest for the college teacher under Texas law, declared:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." [Citations omitted] Such interference with constitutional rights is impermissible.

408 U.S. at 597, 33 L.Ed.2d at 577, quoted in *Elrod v. Burns*, 427 U.S. at 359, 49 L.Ed.2d at 557.

Moreover, the Supreme Court's decision in *Elrod v. Burns, supra*, is significant for its reliance upon, and consistency with, *Illinois State Employees Union v. Lewis*, 473 F.2d 561 (7th Cir. 1972). The decision in *Elrod v. Burns, supra*, was a judgment and opinion by three justices, with a special concurrence by two other justices; but Mr. Justice Stevens did not participate in that decision. However, Mr. Justice Stevens, as a Seventh Circuit Judge, authored the opinion in *Illinois State Employees Union v. Lewis, supra*, with which the Supreme Court's decision in *Elrod v. Burns*, 427 U.S. at 357, 366, 368, 49 L.Ed.2d at 556, 561, 562 is in accord.

In *Illinois State Employees Union v. Lewis, supra*, ordinary, non-policy-making, non-confidential employees of Illinois Secretary of State's Office were terminated when the incumbent Secretary of State, a Democrat, died and the Republican governor appointed a Republican successor. The district court had granted summary judgment for the defendant. 473 F.2d at 565. Mr. Justice Stevens formulated the issue as whether a non-policy-making public employee "may be discharged for refusing to transfer his political allegiance from one political party to another." *Id.* at 566. He held that the "plaintiffs have alleged an impermissible basis for their

discharge," *Id.* at 573, and "are entitled to an opportunity to prove their case." *Id.* at 576. The district court's entry of summary judgment for the defendant was reversed as erroneous, inasmuch as the record at that point did not

> . . . support a factual finding that no plaintiff was dismissed for an impermissible reason or the legal conclusion that [the] defendant was justified in prescribing active support of the Republican Party as a condition of continued public employment. *Id.* at 576.

As a result of the Supreme Court's decision in *Elrod v. Burns, supra*, therefore, there is no doubt that non-confidential, non-policy-making public employees are protected against being harassed or discharged solely because of exercising First Amendment freedoms, such as political beliefs, expressions, and associations. *Norbeck v. Davenport Community School Dist.*, 545 F.2d 63, 67 (8th Cir. 1976); *Division 241, Amalg. Transit Union v. Susey*, 538 F.2d at 906 (E.D.N.Y. 1977); *Nader v. Schaffer*, 417 F.Supp. 837, 845 (D.Conn. 1976); *Barton v. City of Eustis*, 415 F.Supp. 1355, 1359 (M.D.Fla. 1976). Those First Amendment freedoms are protected even if a public employee does not have tenure or some other property right in his job under state law.

In *Gabriel v. Benitz*, 390 F.Supp. 988 (D.P.R. 1975), the plaintiff, a field coordinator within the Puerto Rico Department of Education, found the terms and conditions of her employment substantially changed, culminating in a decision not to renew her contract, five months after a political change in the Secretary of Education. The district court found that the plaintiff had met her burden to show, even by circumstantial evidence, that her termination was prompted solely because of her political affiliation. *Id.* at 992. Any lack of contractual tenure or other property right in her job was immaterial to the protection of her First Amendment freedoms. *Id.* The First Cirucit affirmed the district court's finding of politically discriminatory animus, *Rivera Morales v. Benitz de Rexach*, 541 F.2d 882, 885 (1st Cir. 1976), but at the same time rejected the same First Amendment protection for a different, policy-

making employee of the Puerto Rico Department of Education. *Id.*

The plaintiff in *Lasco v. Koch*, 428 F.Supp. 468 (S.D.Ill. 1977), had been an executive, civil service employee at the Illinois Veterans' Home since 1973. Beginning in 1975 the plaintiff experienced changes in his job conditions and duties, with the final result that his job alone, out of 435 positions, was to be abolished. The plaintiff had supported a different Democratic primary candidate than the defendants. In late 1976, after receiving critical reports in his personnel file, the plaintiff was notified that he was going to be laid off because of reorganization. The district court found that the plaintiff had presented a prima facie case of political discrimination sufficient to warrant a preliminary injunction. *Id.* at 475. But the court stayed further exercise of its jurisdiction in the case pending review by the state civil service commission that had primary jurisdiction over the plaintiff's job loss. *Id.*

In the present case, plaintiffs have the burden to show, both ultimately on the merits, and prima facie on their preliminary injunction motion, that they were not continued in their jobs because of political discrimination. *Elrod v. Burns* 427 U.S. at 374, 49 L.Ed.2d at 565-66; *Illinois State Employees Union v. Lewis*, 473 F.2d at 567; *Lasco v. Koch*, 428 F.Supp. at 475; *Gabriel v. Benitz*, 390 F.Supp. at 992. However, plaintiffs have not met their burden. Defendant has indicated that he did not know or consider the political allegances of plaintiffs or any other employees of the sheriff's department when he decided to retain some and replace others. Deposition at 41, 55, 63. Although plaintiffs supported the candidacy of the incumbent sheriff, so did many other employees, who were retained by defendant. Hence, the fact of plaintiffs' uniform political support alone cannot show any infringement of their First Amendment freedoms by defendant. Far from showing anything additional, plaintiffs have indicated that defendant did not inquire, and discouraged voluntary statements, about their political stances in the preceding election. The Court concludes that plaintiffs have not met their burden to show a prima facie case of politically discriminatory animus by defendant.

Furthermore, even if plaintiffs had demonstrated a prima facie case of political discrimination in defendant's decision not

to continue their employment, they would need to show more in order to prevail. Plaintiffs must show that any impermissible infringement of protected First Amendment freedoms (such as political beliefs, expression, and association) was the primary and dominant cause of their terminations. In short, plaintiffs must show that, even if defendant wished to curtail their protected First Amendment freedoms, apart from that wrongful reason, there were no other good reasons that independently justified their discharges.

In *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 50 L.Ed.2d 471 (1977), an untenured teacher claimed that a refusal to rehire him was motivated by the defendant's antipathy to the teacher's freedom of speech. The teacher had telephoned a local radio station, reporting an intra-school memorandum about a teacher's dress code. The information was broadcast as a news item. When the school board decided not to rehire the teacher, it listed the radio news-information incident as one of the reasons. However, the teacher had repeatedly become embroiled in fractious quarrels with other teachers and school employees, and had used an obscene gesture to female students who disobeyed his order as lunchroom supervisor. The obscene gesture was also listed as a reason not to rehire the teacher. The Supreme Court acknowledged that the teacher's telephone call was constitutionally protected freedom of expression. *Id.* at 482. The Court held, however, that even if the teacher's First Amendment speech was a substantial cause for not being rehired, that would not automatically mean that the refusal to rehire him violated the federal Constitution. *Id.* at 482-83. The proper causation test (1) distinguishes between results caused by violations of constitutional rights and results "not so caused," and (2) avoids entailing "undesirable consequences not necessary" to protecting those rights. *Id.* at 483-84.

Following the Supreme Court's analysis in *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, supra*, the district court in *Lasco v. Kock*, 428 F.Supp. 468 (S.D.Ill. 1977) enjoined preliminarily the plaintiff's layoff, but stayed further action pending the outcome of state administrative proceedings. *Id.* at 475. The defendants contended that the plaintiff's layoff resulted from a reorganization justified by legitimate business necessity. *Id.* at 475, 476. If that were so, then despite the

political discord between the defendants and the plaintiff, his layoff might not have been a violation of his First Amendment rights. *Id.* at 476. On the other hand, there was the possibility that the reorganization was a mere sham to disguise politically animated infractions of the plaintiff's constitutional rights. *Id.*

Recently, the Fifth Circuit, in *Garza v. Rodriquez*, 559 F.2d 259 (5th Cir. 1977), upheld the discharge of a Texas, juvenile probation officer who had no property interest in his job under state law. The probation officer had been arrested for intoxication and behaved abusively. Later, the probation officer indicated his intention to sue the police, and shortly thereafter he was fired. He sued the head of the department where he had been employed. He claimed that his termination was because of his threat to sue the police, and therefore was a discharge "for the exercise of his constitutional rights." *Id.* at 260. There had also been evidence presented to the district court that amounted to "just cause to terminate [the plaintiff]." *Id.* The Fifth Circuit applied the Supreme Court's causation test in *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, supra,* to determine if the plaintiff's discharge, which was based on justified as well as impermissible cause, constituted a violation of fundamental constitutional rights. *Id.* at 261-62. The Court of Appeals concluded that the decision to terminate the plaintiff had been premised on an independently justifiable ground, so that joining a constitutionally forbidden reason as another ground did not taint the good cause for the discharge. *Id.*

Plaintiffs in the present case have not demonstrated anything near a likelihood (1) that they were replaced for politically discriminatory reasons, or (2) that if they had been, there were no other, independent and legitimate reasons to justify replacing them. Defendant, meanwhile, maintains that his decision to replace plaintiffs was based on reasons that, consistent with his campaign promise, would achieve a better operating sheriff's department. Whether those reasons are sound is not within the province of this Court to determine, so long as they are arguably legitimate and not a mere pretext for violating basic constitutional freedoms. Plaintiffs have not established a prima facie case of such pretense that would entitle them to a preliminary injunction.

On the other hand, there exists a genuine, material question

of fact concerning plaintiffs' allegation that they were not retained in their jobs because of their political views. The Court cannot decide that factual question on a summary judgment motion, and the motion must be denied with respect to this one issue. Additionally, whether plaintiffs Tanner and Campbell, as chief deputy sheriff and secretary to the sheriff, respectively, were policy-making or confidential employees, and therefore not protected in their jobs by the First Amendment freedoms, appears to be a mixed question of law and fact. *Elrod v. Burns*, 427 U.S. at 367-68, 49 L.Ed.2d at 562; *Norbeck v. Davenport Community School Dist.*, 545 F.2d at 67; *Rivera Morales v. Benitz de Rexach*, 541 F.2d at 884-85; *Rosenberg v. Redevelopment Authority of Phila.*, 428 F.Supp. 498, 500-01 (E.D.Pa 1977); *Nader v. Schaffer*, 417 F.Supp. at 845. Insofar as the factual facet of that question involves an evidentiary determination of the duties, responsibilities, terms and conditions of a particular job, it is material to the issue of First Amendment protection and requires further evidence. Summary judgment, therefore, is unjustified and improper in the present posture of this case.

Preliminary Injunction: Four Criteria

A preliminary injunction is an extraordinary equitable remedy. *Sampson v. Murray*, 415 U.S. 61, 92 n. 68, 39 L.Ed.2d 166, 187 n. 68 (1974); *Canal Authority of the State of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974); *Lasco v. Koch*, 428 F.Supp. at 475; *Jacksonville Maritime Ass'n, Inc. v. Local 1408-A, Internat'l Longshoremens Ass'n*, 424 F.Supp. 58, 64 (M.D.Fla. 1976); *Jets Services, Inc. v. Hoffman*, 420 F.Supp. 1300, 1302 (M.D.Fla. 1976); *Schrank v. Bliss*, 412 F.Supp. 28, 34 (M.D.Fla. 1976). A preliminary injunction is warranted only if four criteria are established: (1) substantial likelihood of plaintiffs' eventual success on the merits; (2) irreparable injury because of the unavailability of an adequate remedy at law; (3) the plaintiffs' threatened injury outweighs possible injury to the defendant; and (4) no disservice to the public interest from issuance of an injunction. *Granny Goose Foods, Inc. v. Local 70, Brotherhood of Teamsters and Auto Truck Drivers*, 415 U.S.

423, 441, 443, 39 L.Ed.2d 435, 451, 452 (1974); *Sampson v. Murray*, 415 U.S. at 84 n. 53, 39 L.Ed.2d at 183 n. 53 (1974); *Louisiana Consumer's League, Inc. v. State Bd. of Optometry Examiners*, 557 F.2d 473, 474 (5th Cir. 1977); *Martinez v. Mathews*, 544 F.2d 1233, 1243 (5th Cir. 1976); *Buchanon v. United States Postal Service*, 508 F.2d 259, 266 (5th Cir. 1975); *Canal Authority of State of Fla. v. Callaway*, 489 F.2d at 572; *Blackshear Residents Organiz. v. Romney*, 472 F.2d 1197, 1198 (5th Cir. 1973); *Allison v. Froehlke*, 470 F.2d 1123, 1126 (5th Cir. 1972); *Southerwestern Bell Teleph. Co. v. CWA*, 454 F.2d 1333, 1334, 1337 (5th Cir. 1972); *Jacksonville Maritime Ass'n v. Local 1408-A, Internat'l Longshoremen Ass'n*, 424 F.Supp. at 64; *Jets Services, Inc. v. Hoffman*, 420 F.Supp. at 1305; *Schrank v. Bliss*, 412 F.Supp. at 34. The burden is upon plaintiffs to satisfy these four criteria. *Hillsboro News Co. v. Tampa*, 544 F.2d 860, 861 (5th Cir. 1977); *Penn v. San Juan Hosp.*, 528 F.2d 1181, 1185 (10th Cir. 1975); *Canal Authority of State of Fla. v. Callaway*, 489 F.2d at 572; *Jacksonville Maritime Ass'n v. Local 1408-A, Internat'l Longshoremen Ass'n*, 424 F.Supp. at 65; *Jets Services, Inc. v. Hoffman*, 420 F.Supp. at 1305. The evidence presented for each of those criteria is balanced by the Court on a sliding scale analysis: a much stronger showing on one or more of the necessary factors lessens the amount of proof required for the remaining factors. *State of Texas v. Seatrain Internat'l S.A.* 518 F.2d 175, 180 (5th Cir. 1975); *Siff v. State Democratic Exec. Committee*, 500 F.2d 1307, 1309 (5th Cir. 1974); *Jacksonville Maritime Ass'n v. Local 1408-A, International Longshoremens Ass'n*, 424 F.Supp. at 65; *Jets Services, Inc. v. Hoffman*, 420 F.Supp. at 1305-06; *Schrank v. Bliss*, 412 F.Supp. at 34.

1. Likelihood of Success on the Merits

The Court has already held that plaintiffs have failed to show that it is more likely than not that defendant replaced them as deputies sheriff for politically discriminatory reasons; and that such replacement constituted a violation of their First Amendment freedoms because it was prompted only by political discrimination. Consequently, plaintiffs have not satisfied this criterion for a preliminary injunction.

2. Irreparable Injury

Because the Court has already held that plaintiffs have not demonstrated a likelihood of eventual success on their claim that their First Amendment rights have been denied, the fact that plaintiffs might be sustaining irreparable losses and injury cannot justify issuing a preliminary injunction. The fact of irreparable loss or injury alone, without any arguable likelihood to succeed legally on the merits of one's claims, could warrant an injunctive remedy (or any other remedy) only on the theory that for every wrong and ill that occurs there should be a legal remedy fashioned by the Court. Regardless of whether such a legal theory is viable in courts of general jurisdiction, such as state courts, that theory is wholly inconsistent with the strictly limited jurisdiction of federal courts. *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 50 L.Ed.2d at 478; *City of Kenosha v. Bruno*, 412 U.S. 507, 511, 37 L.Ed.2d 109, 115 (1973); *Louisville and N.R. Co. v. Mottley*, 211 U.S. 149, 152, 53 L.Ed. 126, 127 (1908); *Cameron v. Hodges*, 127 U.S. 322, 326, 32 L.Ed. 132, 134 (1888); *Mansfield, C. & L. M. Ry. v. Swan*, 111 U.S. 379, 382, 28 L.Ed. 462, 464 (1884); *Turner v. President, Directors and Co. of Bank of Amer.*, 4 Dall. 7, 8, (1799); *Morrison v. Morrison*, 408 F. Supp. 315, 316 (N.D.Tex. 1976). Consequently, the Court holds that, in the absence of plaintiff's showing that they are likely to succeed on their legal claims, any losses or injuries sustained by them, however irreparable, do not justify issuing a preliminary injunction.

3. Plaintiffs' Injury Outweighs Defendant's Injury

Because the fact of plaintiffs' possible injuries alone cannot warrant a preliminary injunction, there is no need for the Court to consider or balance any possible injury to the defendant from an injunction.

4. No Disservice to the Public Interest

Because the plaintiffs have not shown that they are entitled

to a preliminary injunction, the Court need not consider whether a preliminary injunction would result in a disservice to the public interest. Instead the Court holds, that where there is no clearly demonstrated legal justification for the Court to exercise its jurisdiction and grant relief, the public's interest under the national system of federalism would be ill-served by failing to observe the constitutionally-founded, limited jurisdiction of federal courts.

CONCLUSION

In conclusion, the Court holds that plaintiffs have not shown themselves entitled to a preliminary injunction; and that defendant has demonstrated his right to summary judgment, as a matter of law and in the absence of any genuine factual dispute, concerning plaintiffs' first two claims. Consequently, it is now

ORDERED:

1. Plaintiffs' motion for a preliminary injunction is denied.

2. Defendant's motion for summary judgment on plaintiffs' first two claims, concerning procedural due process for property interest in their jobs, and stigmatization of their good names and reputations, is granted.

3. Defendant's motion for summary judgment on plaintiffs third claim, concerning politically discriminatory discharge violating First Amendment freedoms, is denied.

DONE and ORDERED at Jacksonville, Florida, this 20th day of October, 1977.

/s/

Judge

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No. 80-1227

MAR 25 1981
ALEXANDER L. STEV

In the Supreme Court of the United States

October Term, 1980

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Petitioners,

vs.

MALCOLM McCALL,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit sought to be reviewed herein is now reported as *Tanner v. McCall,* 625 F. 2d 1183 (5th Cir. 1980).

STATEMENT OF THE CASE

Respondent cannot accept Petitioners' Statement of the Case. A Statement of the Facts as found by the Fifth Circuit and reported in the Opinion, is as follows:

> "Willis McCall, the defendant's father, was sheriff of Lake County, Florida from 1945 to 1972. Malcolm

McCall worked in the department for much of that time and was his father's chief deputy from 1966 to 1972. In 1972, Guy Bliss, a Republican, defeated Willis McCall, a Democrat, in the election for sheriff.

* * *

In 1976, Malcolm McCall, running as a Democrat, defeated Bliss's bid for reelection. By this time the department's staff had grown to almost eighty, including between thirty and thirty-five deputies. McCall received approximately three hundred applications for these positions. Before he took office, McCall interviewed almost all of the Bliss employees as applicants for employment. Generally, the interviews were to acquaint McCall with the employees, their jobs, their attitudes about their jobs, and their feelings about working for McCall. McCall assumed that all employees had supported Sheriff Bliss during his bid for reelection; McCall claims he would have thought less of them if they had not. McCall did not ask interviewees which candidate they had supported or their political party affiliation; he actually discouraged employees from volunteering that information. McCall did not tell any of the plaintiffs that he was not reappointing them for patronage reasons.

McCall decided to reappoint all but nineteen or twenty of the Bliss employees. Three other Bliss employees resigned. Fifty-five of the Bliss employees whom McCall reappointed were still employed in the department when the case was tried." 625 F. 2d at 1186, 1187.

ARGUMENT

Rule 17 of the Rules of the Supreme Court makes it clear that review by a Writ of Certiorari ". . . is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." It is unclear from the Petition for Certiorari the basis on which Petitioners seek to have this Court grant certiorari. It must of necessity be grounded on Rule 17.1(a) or (c) but Petitioners have not pointed out any conflict between the decision of the Court of Appeals in the case at bar and any other Court of Appeals or any decision of this Court on the same matter. Neither has there been any showing that the decision of the Fifth Circuit ". . . has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." Likewise, there is apparently no contention that the Court of Appeals has decided an important question of federal law which has not been ruled on by this Court, nor that the Court of Appeals decided a federal question in a way which would conflict with the applicable decisions of this Court.

The decision of the Fifth Circuit in the case at bar is based on its conclusion that the evidence produced by Petitioners at trial was legally insufficient to create a jury question. What Petitioners urge this Court to do is to apply the Doctrine of res ipsa loquitur to public employees and to hold that any time an employee of an elected official is terminated or not retained by that elected official's successor, that employee has a prima facie case of denial of his constitutional rights under the First Amendment for exercising his political beliefs. The Fifth Circuit considered and discussed in its Opinion this Court's decision in *Elrod v.*

Burns, 427 U.S. 347, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976), and *Branti v. Finkel,* ..... U.S. ....., 63 L. Ed. 2d 574, 100 S. Ct. 1287 (1980), an Opinion which was rendered by this Court very shortly before oral argument in the Fifth Circuit. The Court below very correctly applied the legal rulings in *Elrod* and *Branti,* supra, but found that the evidence produced by Petitioners at trial was insufficient to create a jury question as to whether the Respondent, Sheriff Malcolm McCall, had violated the proscriptions of *Elrod* and *Branti,* supra.

The case of *Gabriel v. Benitez,* 390 F. Supp. 988 (D. Puerto Rico 1975), aff'd sub nom., *Riviera Morales de Benitez de Rexach,* 541 F. 2d 882 (1st Cir. 1976), is factually distinguishable from the case at bar. The following is the factual situation from *Gabriel,* supra, as stated by the District Court:

> "The chain of circumstances herein clearly points to the missing link, which is Defendant's political motivation in her non-renewal of Plaintiff's contract. Plaintiff was hired for a three-year program; she performs her work without complaint from her supervisors; Defendant, a prominent member of the popular Democratic party, becomes Secretary of Education; thereafter Plaintiff, a member of the New Progressive party, is eliminated from attendance at staff conferences, and is not allowed to communicate with her program directors in the mainland; Defendant 'terminates' Plaintiff's employment as of June 30, 1973, and the day after, hires a member of her own party to replace Plaintiff; no reasons are given to Plaintiff for her 'termination;' the three-year program continues in full force and effect after Plaintiff's departure." 390 F. Supp. at 993.

Compare that statement from *Gabriel*, supra, with the following statement from the Fifth Circuit in the case at bar:

> "Plaintiff's contention can only be that retention or appointment coincided with support and loyalty for a man, not for a political party.
>
> Even in this regard, the facts do not support plaintiffs' position. Unlike the employers in *Elrod* and *Branti*, McCall did not effect a wholesale replacement of employees. He failed to reappoint only between twenty and thirty percent of the employees appointed by Bliss or about twenty of the eighty employees. He did not fire all Bliss supporters. He did not appoint only ardent McCall supporters. He did not appoint only Democrats. Although all the plaintiffs were Bliss supporters, McCall assumed all employees had supported Bliss. McCall actually knew that some of the employees he was reappointing had actively supported Bliss. No evidence was admitted to show that the plaintiffs were more active than most Bliss supporters, or to show that the replacement appointees were more active than most McCall supporters. Only one of the appointees who might have been a replacement for a plaintiff contributed money to McCall's campaign.
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> Plaintiffs supplied no direct statements by McCall that political patronage motivated his appointments. Statements which might be considered most suggestive of such a motive were not directed to plaintiffs, and do not support an inference of an overall pattern of patronage motive." 625 F. 2d at 1191.

CONCLUSION

Petitioners contend that this Court should review the case ". . . because the issue of patronage dismissals, and the burden of proof in such cases, is a matter of substantial public importance and concern . . .". Respondent submits that the burden of proof in patronage dismissal cases is identical to the burden of proof in any case. If the Plaintiff is able to produce evidence, whether direct or circumstantial, that he was terminated from his public employment solely because of his exercise of first amendment freedoms, then he is entitled to have his case decided by a Jury. If he cannot meet that burden of proof he is not so entitled. The District Judge in the case at bar should have granted the Defendant's Motion for Directed Verdict as the Fifth Circuit correctly held. This Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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